DPI New England *and* International Brotherhood of Teamsters, Local 25. Case 1–CA–44833

October 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On May 29, 2009, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.[4]

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Derek Mace, and by imposing a new Class A licensing requirement and discharging employees Alexander Adorno, Roger Beattie, and Anthony Glover pursuant to that requirement. We agree with the judge that Mace's suspension and discharge violated the Act.[5] For the reasons set forth below, however, we find that the Respondent did not violate the Act by imposing the Class A licensing requirement and discharging Adorno, Beattie, and Glover. Contrary to the judge, we find that the Respondent proved that it would have imposed its Class A licensing requirement and discharged the employees for legitimate business reasons even in the absence of union activity. Accordingly, we reverse the judge and dismiss these allegations.

I. FACTUAL BACKGROUND

The Respondent supplies and delivers products to Starbucks stores in New England. Until March 2008, it delivered paper products, dairy items, juices, water, pastries, and sandwiches. Both straight trucks and larger tractor-trailers were used to deliver the cargo. Straight trucks could be driven by drivers with either a Class A or Class B commercial driver's license, but tractor-trailer drivers were required to have a Class A license.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. September 11, 2009)(No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. August 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009), petition for cert. filed sub nom. *NLRB v. Laurel Baye Healthcare of Lake Lanier, Inc.*, __U.S.L.W.__ (U.S. September 29, 2009)(No. 09-377).

[2] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) of the Act by disciplining employee Frederick "Rick" Crane, and Sec. 8(a)(1) by interrogating employees and creating the impression of surveillance. Nor were exceptions filed to the judge's dismissal of additional impression of surveillance allegations.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] In his cross-exception and supporting brief, the General Counsel seeks compound interest computed on a quarterly basis for any make-whole relief awarded. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Goya Foods of Florida*, 352 NLRB 884 fn. 2 (2008).

Although acknowledging that the judge's recommended Order and notice contain appropriate remedial provisions for the unlawful discipline of Rick Crane, the General Counsel excepts to the judge's "inadvertent omission" from his remedy section of any mention of those remedies. We agree with the General Counsel that the judge's recommended Order and notice provisions concerning the Crane violations are appropriate (and we have set them forth below), but we find it unnecessary to amend the judge's remedy section to specifically refer to those provisions.

[5] In affirming the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by suspending and discharging Mace, we find it unnecessary to rely on the judge's application of *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). In cases involving union-related solicitation or literature distribution by an employee, the Board has held that "when an employer has failed to adopt and publish a valid rule regulating union activity during work time, discipline for that reason will be upheld only when the employer demonstrates that it acted in response to an actual interference with or disruption of work." *Cal Spas*, 322 NLRB 41, 56 (1996), enfd. in relevant part 150 F.3d 1095 (9th Cir. 1998), citing *Mast Advertising & Publishing*, 304 NLRB 819, 827 (1991); *Trico Industries*, 283 NLRB 848, 852 (1987). Here, the judge found, and we agree, that the Respondent did not adopt and publish a valid rule regulating solicitation or distribution during worktime. In light of the judge's credibility resolutions, which we affirm, we find, in agreement with the judge, that the Respondent did not prove that Mace's organizing activities actually interfered with or disrupted either Mace's work or that of other employees. Accordingly, the Respondent's suspension and discharge of Mace for engaging in organizing activities during worktime violated Sec. 8(a)(3) and (1) of the Act.

Starting in March, the Respondent added new items, and between March and May, drivers became increasingly concerned about the extra cargo they were carrying.[6] Those concerns led to the initiation of a union campaign. In June, straight-truck driver Roger Beattie contacted International Brotherhood of Teamsters, Local 25, and he subsequently distributed union authorization cards and literature to truckdrivers and organized meetings between drivers and union officials.

Sometime between April and June, the Respondent decided to phase out the use of the straight trucks on the delivery routes and replace them with tractor-trailers that could only be driven by drivers with Class A licenses.

On July 11, the Respondent held a meeting with the drivers to address the union campaign. At the meeting, Mark Donahue, Respondent's director of operations, stated that he heard "bad rumors" that a lot of people wanted the Union, and he warned that "there should be no union activity on the property" and that such activity was a "terminatable offense." Donahue also stated that he was "disappointed" by the union activity and he invited the drivers to discuss their grievances. In response, Beattie complained about the dramatic impact the increased cargo had on his workload.

After the meeting, the Respondent's operations manager, Frank Driscoll, told Beattie and the other Class B drivers, including Adorno and Glover, that they should begin the process of upgrading their driver's licenses to enable them to drive the tractor-trailers. A notice dated July 11, stating that Class B drivers were required to have Class A licenses by September 15, was posted on the drivers' room door on July 12. The notice offered the Respondent's assistance to the Class B drivers in upgrading their licenses, including training and the availability of the Respondent's equipment and experienced drivers both for practice and for the road test. The Respondent also offered to pay the cost of each employee's first road test, as well as a re-test if necessitated by equipment problems.

Drivers Beattie, Adorno, and Glover made no attempt to obtain Class A licenses by the September 15 deadline, and they were discharged. The Respondent offered them positions in the warehouse, albeit at a reduced wage rate, but they all declined. Operations Manager Driscoll told the three employees that "if they got their class A license[s] they were more than welcome to come in and reapply."

II. JUDGE'S DECISION

The judge found that the Respondent imposed the Class A license requirement to eliminate Beattie, the "prime mover of the union effort," and that Adorno and Glover were swept up in the adverse employment action as cover for that discriminatory act. The judge first found that the General Counsel met his initial burden under *Wright Line*[7] to show that union activity was a motivating factor in the decision to discharge the employees. Although acknowledging that the question was a "close" one, he then found that the Respondent did not meet its *Wright Line* burden of showing that it would have enacted the new licensing requirement and terminated the three drivers even absent the union activity. The judge concluded that the Respondent showed that it had a good reason to phase out the straight trucks in favor of the larger tractor-trailers, but it "failed to demonstrate by a preponderance of the evidence that it would have implemented the new requirement *when* it did and *how* it did if not for its antiunion animus."

III. RESPONDENT'S EXCEPTIONS

The Respondent contends that the new licensing requirement was necessitated by the expansion of the business, and that the drivers were given sufficient advance notice and offers of assistance to enable them to meet the deadline. It further asserts that the judge substituted his business judgment for that of the Respondent and ignored evidence as to the implementation of its new requirement.

The Respondent claims it implemented the Class A policy on July 11 and set the September 15 deadline because in June Starbucks had informed it to expect a surge of paper product deliveries in August, and it was aware that Class B drivers could obtain a Class A license in 9 weeks. In explaining why it announced the new requirement on July 11, the Respondent relies in part on employee Beattie's complaint at the July 11 meeting that his workload had dramatically increased, and Operations Manager Driscoll's statement to Beattie after the meeting that they were anticipating a "big rush in the winter." The Respondent also contends that the judge should have drawn the inference that the September 15 deadline was "fair and achievable," particularly given the employees'

[6] At times, as a result of the increased volume, the cargo did not fit into the smaller straight trucks used on certain routes. When this occurred, the cargo had to be removed from the straight truck and reloaded onto a tractor-trailer, and a Class A driver had to be called in. Because the Class A driver was unfamiliar with the route, the Class B driver who normally drove the route would be required to ride along. In addition, the increased cargo volume in the straight trucks also resulted in longer loading and unloading times, as well as more frequent product damage. Drivers were not compensated for the increase in time required to complete their routes because they were paid on a per trip basis, rather than by the hour.

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

work schedule, which, the Respondent asserted, made it easier for employees to complete their training.

IV. ANALYSIS

We assume arguendo that the General Counsel met his initial burden under *Wright Line* to prove that union activity was a motivating factor in the decision to impose the Class A licensing requirement and to discharge the employees. Nevertheless, we find that the Respondent met its burden to prove that it would have acted in the same manner for legitimate business reasons regardless of any union activity.

The judge found, and we agree, that because of the problems associated with increased cargo volume, the Respondent had a legitimate reason to phase out the straight trucks in favor of the larger tractor-trailers, and therefore also to establish a Class A license requirement. The Respondent had recently experienced an increase in cargo volume that created problems using the straight trucks, and the Respondent was anticipating a further increase in August. The judge, however, declined to find that the Respondent had established a legitimate business justification for the imposition of the Class A requirement and the resulting discharges because, in his view, the Respondent had not proved that it would have implemented the new requirement *when* it did and *how* it did if not for its antiunion animus. In so finding, the judge relied in part on the brevity of the notice period, and he drew the inference that the "extremely short deadline" was established so that "the drivers would almost certainly fail to meet it." In our view, such an inference is unwarranted.

The General Counsel's case was substantially premised on the testimony of Beattie, Adorno, and Glover, each of whom testified that the drivers were not told of the new license requirement until September 4, less than 2 weeks before the September 15 deadline. Such short notice would, indeed, have strongly supported the General Counsel's theory that the Respondent imposed the requirement knowing that Beattie and the other Class B drivers would not be able to meet it. The judge, however, discredited that testimony. He found instead that the drivers received notice of the September 15 deadline, both orally and in writing, in July.

Unlike the less than 2-week notice alleged by the General Counsel, the approximately 2-month notice period found by the judge was not so short as to warrant the inference, drawn by the judge, that the Respondent established the requirement knowing that the employees would almost certainly be unable to fulfill it. This is demonstrated by undisputed evidence that another Class B driver, Carlos Marques, presented himself for the Class A road test after about 5 weeks of training.[8] Beattie, Adorno, and Glover did not even attempt to meet the September 15 deadline, even though their work schedules—which did not require them to work every day—would have given them an opportunity to engage in the necessary test preparation.

In addition, the wording of the written notice dated July 11 and posted on July 12 does not support a finding that the Class A requirement was a part of an effort to get rid of Beattie or any other Class B driver. In fact, the notice suggests just the opposite. The notice offered the Respondent's Class B drivers substantial assistance in obtaining their Class A licenses. Specifically, the Respondent offered the employees training, the use of its trucks, and help from its experienced Class A drivers, both for practice and for the employees' road tests. In addition, it offered to pay the cost of each employee's first road test, as well as an additional test if the re-test was necessitated by equipment problems. Those offers of assistance belie the judge's inference that the Respondent was hoping that the Class B drivers would be unable to meet the deadline.

Similarly, when Beattie, Adorno, and Glover were removed from their driver positions in September, the Respondent offered each of them a position in the warehouse, even though the Respondent knew, by that time, that the Union was attempting to organize the warehouse employees in addition to the drivers. This offer seems inconsistent with a motive to eliminate union supporters affected by the licensing requirement.[9]

In view of all the facts, we are not persuaded that the Respondent established a Class A license requirement that would affect several employees, in the hope that one union activist, Beattie, would be unable to meet it and so provide the Respondent with a justification for his discharge. Instead, we find that the Respondent met its burden of showing that the Class A license requirement was established in July for legitimate business reasons, i.e., the recent and anticipated increases in cargo volume. We therefore dismiss the allegations that the Respondent's imposition of the Class A license requirement and its discharges of Beattie, Adorno, and Glover violated the Act.

[8] Marques' actual test was delayed twice because of equipment problems.

[9] Member Schaumber would also rely on Driscoll's testimony that he told the employees that "if they got their class A license[s] they were more than welcome to come in and reapply." In Member Schaumber's view, such a statement, while not a guarantee of rehiring, is not indicative of an intent to rid the workplace of union supporters.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 4:

"4. The Respondent violated Section 8(a)(3) and (1) of the Act: on July 24, 2008, when it suspended Mace, and on August 4, 2008, when it converted that suspension into a termination, because of Mace's union and concerted activities and in order to discourage such activities; and in September 2008, by issuing warnings to Crane because of his union and concerted protected activities, and in order to discourage such activities."

ORDER

The Respondent DPI New England, Canton, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about activities protected by Section 7 of the Act.

(b) Creating the impression that it has placed employees' union activities under surveillance.

(c) Discharging or suspending any employee for supporting the International Brotherhood of Teamsters, Local 25 or any other union.

(d) Issuing a written warning to, or otherwise disciplining, any employee for supporting the International Brotherhood of Teamsters, Local 25 or any other union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Derek Mace full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Derek Mace whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Derek Mace, and within 3 days thereafter notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(d) Within 14 days from the date of this Order, rescind and revoke the written warnings issued to Frederick "Rick" Crane in September 2008.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written warnings issued to Frederick "Rick" Crane, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Canton, Massachusetts, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2008.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT create the impression that we have placed your union activities under surveillance.

WE WILL NOT discharge, suspend, or otherwise discipline any of you for supporting International Brotherhood of Teamsters, Local 25, or any other union.

WE WILL NOT issue warnings or other discipline to you for supporting International Brotherhood of Teamsters, Local 25, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Derek Mace full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Derek Mace whole for any loss of earnings and other benefits resulting from the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Derek Mace, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, rescind and revoke the unlawful written warnings issued to Frederick "Rick" Crane in September 2008.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warnings issued to Frederick "Rick" Crane, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warnings will not be used against him in any way.

DPI NEW ENGLAND

Elizabeth Tafe, Esq. and *Emily Goldman, Esq.,* for the General Counsel.

Arthur M. Brewer, Esq. and *Kraig B. Long, Esq. (Shaw & Rosenthall, LLP),* of Baltimore, Maryland, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Boston, Massachusetts, on February 9, 10, and 11, 2009. The allegations concern the actions of DPI New England (the Respondent) during a union organizing campaign that began among its employees in June 2008. The International Brotherhood of Teamsters Local 25 (the Union) filed the initial charge on July 25, 2008, and an amended charge on December 16, 2008. The Director of Region 1 of the National Labor Relations Board (the Board) issued the complaint on December 31, 2008.[1] The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees about union activities, and creating the impression that the employees' union activities were under surveillance. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) by discriminating based on employees' union and other protected concerted activities when it: suspended and terminated employee Derek Mace; issued disciplinary warnings to employee Frederick "Rick" Crane; and imposed a new eligibility requirement that resulted in the constructive discharge, or discharge, of three drivers (Alexander Adorno, Roger Beattie, and Anthony Glover). The Respondent filed a timely answer in which it denied that it had committed any of the unfair labor practices alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Canton, Massachusetts, distributes goods to stores that Starbucks Corporation owns and operates throughout New England. In conducting this business, the Respondent annually purchases and receives at its Canton facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts, and annually provides services valued

[1] All dates are in 2008, unless otherwise indicated.

in excess of $50,000 to Starbucks Corporation, an entity engaged in interstate commerce in states other than the Commonwealth of Massachusetts. The Respondent admits, and I find, that it is employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Background Facts

The Respondent is a distribution and supply company that delivers products to 325 Starbucks stores and licensed Starbucks venders (collectively referred to as Starbucks stores or stores) in Connecticut, New Hampshire, Maine, Massachusetts, New York, Rhode Island, and Vermont.[2] In addition, the Respondent delivers Starbucks products to a number of distribution centers operated by other companies. The Respondent has a facility in Canton Massachusetts, where products are received, stored, and loaded for delivery. Its corporate offices are located in Maryland. The Respondent uses trucks to make its deliveries and also to pick up some of the product that it delivers. Much of the product that the Respondent transports is Starbuck's own inventory and the Respondent is only responsible for receiving that product at the Canton facility and delivering it to Starbucks stores and distribution centers. Other categories of product are owned by the Respondent and purchased from it by Starbucks. As of the time of the trial, the Respondent employed 50 truckdrivers[3] and 47 warehouse workers. The Respondent's truckdrivers and warehouse workers are supervised, respectively, by transportation supervisors and warehouse supervisors. During the time period covered by the complaint the Respondent also had a transportation manager, Dave Robitaille. The supervisory personnel report to Frank Driscoll, the Respondent's operations manager. Driscoll, in turn reports to Mark Donahue, who is the Respondent's director of operations. Driscoll has been operations manager since July 2007. Donahue has been the director of operations since some time in 2007, and before that he was the Respondent's operations manager.

The delivery services that the Respondent provides to Starbucks expanded significantly in recent years. The Respondent began its operations in approximately 2005 and until March 2008, the types of products it delivered were limited to paper products (such as, cups, lids, napkins, paper towels), dairy items, juices, water, pastries, and sandwiches. Starting in March 2008, the Respondent added two broad categories of product known as "high volume" items[4] and "cross dock coffee." High volume items include those things that the Starbucks stores use in large quantities on a daily basis. The "cross dock coffee" category includes not only coffee, but also coffee mugs, coffee makers, musical recordings, signs, display tables, and other miscellaneous items seen in Starbucks stores.

In an effort to prepare for the increased workload, the Respondent added 8t to 10 trailers to its truck fleet and hired additional drivers. On March 1, 2008, the Respondent split most of its routes in order to reduce the number of stores covered by each route and help accommodate the larger deliveries it was making to individual stores.[5] Nevertheless, between March and May 2008, truckdrivers began to notice very substantial increases in the total cargo they were carrying on their trucks.

In August 2008, the Respondent began selling Starbucks the paper products that it delivered to the stores. Prior to that time, the Respondent received pre-assembled pallets of Starbucks-owned paper products and then delivered those pallets to individual stores on a weekly basis. After the Respondent began to sell the paper products to Starbucks, it began making such deliveries to individual stores on a daily, rather than a weekly, basis. It appears that the August 2008 changes in the Respondent's role with respect to paper products increased to some extent the size of the loads the Respondent was carrying on its trucks.

As a result of the increase in the amount of product being delivered, the Respondent found that, by April 2008, it was sometimes unable to fit the cargo for a route onto one of its smaller, "straight truck" vehicles and was forced to remove that product and reload it onto a larger tractor-trailer truck. In some instances this meant that the driver who usually made the deliveries, and therefore was familiar with the route, had to ride together with a driver who was qualified to operate the larger tractor-trailer truck. In such instances, the Respondent paid two drivers to complete a route that was usually completed by a single driver. The larger loads also increased the extent to which cargo had to be "stacked" in order to fit on the straight trucks, and this meant that the product was damaged more frequently. The Respondent's tractor-trailer trucks were large enough to accommodate product without this increased stacking. In its brief the General Counsel concedes that, as a result of the larger size of the loads, the "Respondent apparently experienced limitations on its ability to effectively utilize the straight trucks." Brief of General Counsel at 9.

The stacking of product on the straight trucks also made it more difficult and time consuming for drivers to load and unload those trucks. This was a serious concern to the drivers because they are paid by the "trip"—meaning that they receive a fixed amount of compensation for completing a route, regardless of how long that takes. Thus the drivers do not receive any additional compensation even if an increase in load size means they have to work longer shifts. The Respondent expects that it will take a driver 10 hours to complete the day's route and associated tasks. However, some drivers found that with the

[2] The Respondent's only client is Starbucks, but it is associated with a larger corporate entity that has clients besides Starbucks. Starbucks does not own the Respondent.

[3] This total is down slightly from July 2008, when the Respondent employed approximately 55 drivers.

[4] The high volume items are often referred to in the record as "SKUs."

[5] Generally a driver is assigned to the same route for an extended period of time. Each night-shift route is serviced 7 days a week. One night-shift driver completes the route 4 days a week, and another night-shift driver completes the same route 3 days a week. The driver who delivers the route 3 days a week will work one additional night shift as a "floater" who can perform a variety of driving and other tasks. On average there are 3 floaters on a night shift. The drivers who service the day routes do not switch off with another driver in this manner.

increased size of the loads the "trips" were consistently taking more than 10 hours to complete. This appears to have been one of the concerns that led drivers to initiate the union campaign.

B. Union Campaign

During the second week of June 2008, employee Roger Beattie, who operated one of the Respondent's straight trucks, contacted the Union about representing employees at the Respondent's facility. Shortly thereafter, the Union supplied Beattie with union authorization cards and prounion literature. Beattie distributed between 40 and 45 authorization cards, and prounion literature, to truckdrivers employed by the Respondent. He also organized meetings between truckdrivers and union officials. Union officials held three meetings with drivers over the course of 2 weeks during the first part of July. The initial two meetings were both held at the headquarters of the union local and attracted between two and four drivers each. The third meeting was held at a donut store in Canton and was attended by between 15 and 20 drivers.

Another straight truckdriver, Frederick "Rick" Crane, supported the organizing campaign by passing out 20 union cards to drivers, distributing prounion literature to approximately eight drivers, talking to people about the Union, signing a union card himself, and attending a union meeting. The record does not reveal precisely when Crane engaged in most of these activities. However, it does show that the union meetings Crane and other drivers attended took place in the first part of July, and that Crane had distributed union literature by September 14 at the latest.

During roughly the same time period when Beattie and Crane were working to generate support for the Union among drivers, Derek Mace, a warehouse employee, was leading an effort to generate support among the Respondent's warehouse workers. Mace obtained union authorization cards from Beattie, and distributed 20 or more such cards to warehouse employees. In June and July, Mace had conversations about the Union with other employees on a daily basis, and eventually raised the subject with almost every one of the Respondent's approximately 47 to 50 warehouse employees. In some instances Mace initiated these conversations, and in others the employees did so. None of Mace's conversations about the Union were heated and none of the employees told him not to talk to them about the Union. In some instances, Mace's conversations with employees took place while the other employee was working. However, the record shows that employees could perform warehouse work while they were talking about nonwork related matters, and Mace credibly testified that his conversations with employees did not disrupt their work. Indeed it is undisputed that warehouse employees routinely talk about a variety of other subjects while working—including sports and after-work activities—without interference from the Respondent. On July 17 2008, there was a union meeting for the warehouse employees at a restaurant in Canton, Massachusetts. This meeting was attended by officials of the Union and a group of about 10 warehouse employees. Mace discussed his concerns about workplace safety with an official of the Union. The union official suggested that Mace report his concerns to the Occupational Safety and Health Administration (OSHA), and Mace did so in June or July. Shortly thereafter, OSHA investigators visited the Respondent's facility to perform an inspection. The record does not disclose the exact date of that inspection, but it is clear that it occurred sometime before July 28.[6]

Mace's efforts on behalf of the Union did not prevent him from performing his job duties, which consisted mainly of "picking" milk products that were designated for particular orders and organizing those products onto pallets that would then be loaded onto trucks for delivery to stores. On a typical day during the summer of 2008 there were approximately 24 such orders, and between three and four people picking the orders. Mace usually picked between 8 and 10 orders. He also helped to load trucks.[7]

Approximately 25 to 30 of the Respondent's approximately 50 to 55 truckdrivers signed authorization cards and returned them to Beattie. The record does not reveal how many of the approximately 47 warehouse employees signed union cards. Among the issues that drivers were concerned about were the replacement of trip pay with hourly pay and the institution of new retirement benefits. Not all employees welcomed the union effort. In late June 2008, Ron Belanger,[8] after speaking to one of the Respondent's warehouse supervisors (Barry Lopes), approached Beattie and complained that the union supporters were "screwing everybody over." Subsequently, on occasions in July and August, Belanger made further comments in the same vein to Beattie. In August, Belanger approached another

[6] A letter sent to the Union by the Respondent's counsel states that the inspection occurred on July 25, GC Exh. 21, but there was no sworn testimony to that effect and no OSHA notice or other documentary evidence confirming the date. In its brief, the Respondent states that it had no knowledge of Mace's involvement in the OSHA inspection at the time it suspended him. R. Br. at 29, Par. 170. Before the suspension was converted to a discharge, however, the Union circulated a flyer concerning Mace's OSHA complaint to the Respondent and others.

[7] Driscoll testified that he received reports from employees and supervisors that Mace was not performing his job duties and was interfering with other employees' work. However, the Respondent failed to call any of those employees or supervisors to testify about what they had witnessed. Mace, on the other hand, appeared as a witness and testified that while talking about the Union he continued to complete his work and did not interrupt the work of others. Although Mace was an ardent union supporter, and has a personal stake in the outcome of this proceeding, I found him generally credible based on his demeanor and the record as a whole. With respect to the question of whether Mace actually failed to meet his responsibilities as an employee and interfered with the work of other employees, Driscoll's testimony is hearsay and, given the record here, is outweighed by Mace's credible contrary account. The reliability of Mace's testimony on this subject was enhanced by the level of detail he provided. Mace specified how many milk orders were typically completed during his shift (24), how many employees those orders were divided among (3 to 4), and how many of the orders he himself was completing per shift (8 to 10). Driscoll, on the other hand, gave only general testimony about reports that Mace was leaving his work area and not completing his work. Driscoll did not state how many milk orders Mace was expected to complete or how many he was completing. Nor did Driscoll contradict Mace's testimony regarding those numbers.

[8] This individual's name also sometimes appears in the transcript spelled "B*a*langer."

union supporter, Crane, and said: "Hey pussy boy. The Union is not getting in. You used my name." Subsequently, Crane attempted to explain his position regarding the Union to Belanger. Belanger did not respond to Crane, but rather walked away and went to talk to the Respondent's operations manager, Driscoll.

C. Management Meets with Employees

By late June, Driscoll had heard about the existence of the union effort at the facility. In response to the organizing effort, the Respondent required employees to attend meetings at which Donahue, the Respondent's director of operations, delivered remarks opposing unionization. Drivers were required to attend such a meeting in the facility's breakroom on July 11. In addition to Donahue, there were two warehouse supervisors—Rod Grippen and Lopes—present for management. Donahue stated that he had "heard bad rumors" that "a lot of people wanted the union in." He warned the drivers that "there should be no union activity on the property," and that such activity was a "terminatable [sic] offense." Donahue also stated that he was disappointed by the union activity since the Respondent had always had "an open door policy." He invited the drivers to discuss their grievances. A number of drivers spoke. Beattie, publicly complained that there had recently been a dramatic increase in the workload on his route. He expressed the view that the Respondent had increased his workload in retaliation for his efforts on behalf of the Union.[9] Crane also spoke at the meeting. He complained that the Respondent was not paying employees for attending the mandatory meeting. When Donahue asked why employees wanted union representation, Crane answered by describing a safety problem and complained that even after that problem had caused an injury, the Respondent neglected to repair it. Either at, or immediately following, this meeting, Driscoll told Beattie and two other drivers who were not qualified to drive tractor-trailer trucks, that they should begin the process for upgrading their commercial drivers' licenses.

In July, the Respondent also held a meeting in the breakroom to discuss the union campaign with warehouse employees. Present at the meeting from management were Donahue, Driscoll, and a warehouse supervisor named Barry Baldack.[10] Donahue informed the employees that there was "talk of . . . a union going around the warehouse." He told them, "You don't need this, we don't need a third party, you know, we're like family." Donahue reminded them that in the past he had provided jobs to immediate family members of incumbent employees. He said he wanted to know "if anyone has information on what" is "going on." Donahue also warned that he was "not going to let anybody to solicit on company property." He said "I'm not going allow somebody to come here and sell you guys carpets, so I'm not going to let somebody come in and sell union to you guys either."

Prior to the union campaign, the Respondent had never told Crane that employees could not discuss any nonwork topic while working, much less said that such discussions were a "terminatable offense." Moreover, the Union was the only topic that Crane ever heard the Respondent's officials declare off limits for work-time discussions. Similarly, prior to the union campaign, the Respondent had never told Mace that employees were not permitted to solicit during work. The record does not include any written company policy against solicitation and distribution and the Respondent has not asserted that such a written policy existed. Indeed, the record shows that it was common for employees to distribute sales catalogues, ask coworkers to purchase items, and make fund raising solicitations both in the breakroom and in work areas of the facility. Such solicitations sometimes occurred while the employees were working.

Also in July, Driscoll questioned a driver named Anthony Glover about conversations that Beattie had been having on the dock with other employees. Glover and Beattie were friends, and Glover was aware of the union campaign in early July and signed a union authorization card. Driscoll called Glover by phone while Glover was driving his truck to make deliveries. He asked whether Glover could tell him what "Beattie is talking to all the drivers for?" Driscoll cautioned Glover to be "real frank . . . real serious." Glover responded that he did not know what Driscoll was talking to employees about. It was unusual for Driscoll to contact Glover while he was driving his route. Generally Driscoll only did so if there was something he needed to communicate regarding the deliveries.

D. Mace Terminated

The Respondent discharged Mace—the lead union organizer among the warehouse workers—on August 4, after suspending him on July 24. Mace had been working for the Respondent since February 2006. Driscoll informed Mace of the suspension at a July 24 meeting held in Donahue's office. Warehouse Supervisor Baldack was also present. Driscoll stated that he knew Mace was responsible for the union organizing and said that other employees felt "threatened" by him and were "scared" that they were "going to lose their jobs." Mace was not provided with any disciplinary paperwork at this meeting, but Driscoll stated that he was being suspended until further notice because he was not working, was interfering with other employees, and was soliciting on company time and where other people were working. At the meeting, Mace responded: "I haven't done anything wrong, . . . I haven't broken any laws and I don't understand why I'm being suspended. I do my work all the time." Mace also told Driscoll that he had "nothing to do with the Union." During the period leading up to the July 24 suspension, no supervisor had told Mace that he was not getting his work done.

In a subsequent letter dated July 28, Driscoll stated that Mace was suspended "pending further investigation into complaints made by employees" that he was "interfering with their work." The letter informed Mace that "it may be necessary to take further disciplinary action up to and including dismissal, if the investigation concludes that you violated the company's solicitation and distribution policy." The letter makes no men-

[9] Beattie did not address this remark directly to Donahue, but to another employee. However, the testimony leads me to find that Beattie made the remark as part of the public back-and-forth at the meeting. See Tr. at 70 to 71.

[10] This individual's name also sometimes appears in the transcript spelled "Baldeck."

tion of Mace failing to perform his own duties. The next week, Driscoll and Baldack met with Mace a second time. Driscoll testified that he told Mace: "[Y]ou lied. You lied to me about where you were, you lied to me about soliciting and looking for Union votes . . . in the warehouse, handing out literature in the building."

After the second meeting with Driscoll and Baldack, Mace received a letter, signed by Driscoll and dated August 4, 2008, which stated that Mace's employment with the Respondent was terminated effective that day. The letter set forth the bases for termination as follows:

- Interfering with your co-workers' jobs
- Not doing your work
- Dishonesty towards Management
- Violation of the No Solicitation and Distribution Policy.

In addition, the letter stated that:

> During the course of the investigation you categorically denied interfering with your co-workers performance of their jobs. We have information from several sources w[hich] substantiate you did, in fact, interfere with your co-workers while they were working. In short, you lied to management.

Prior to the suspension, Mace had never received any warnings or other discipline for interfering with coworkers' performance of their job duties, failing to perform his own work, dishonesty towards management, or violation of any policy on solicitation or distribution.[11] At trial, Driscoll testified that he "might have" told an agent of the Board that by "dishonesty to management," he meant that Mace had denied involvement with the Union. As discussed above, during the second meeting regarding Mace's discipline, Driscoll told Mace, "[Y]ou lied to me about soliciting and looking for Union votes . . . in the warehouse, handing out literature in the building."

At trial, Driscoll was the only witness who testified for the Respondent about the shortcomings upon which Mace's suspension and termination were purportedly based. Driscoll could recount just one specific incident that he personally witnessed. Driscoll testified that in late June or July 2008, he witnessed Mace giving Beattie a ride along the Respondent's dock on an unloaded pallet jack.[12] Then Mace and Beattie went into Beattie's trailer and remained there for approximately 20 minutes. Driscoll testified that he eventually told Mace to return to work and that Mace said he had been helping Beattie. Driscoll states that, on the same day, many employees were straying from their normal work patterns and that he counseled at least one other driver—this one not an alleged discriminate—for failing to load his truck in a diligent manner. Driscoll also stated that drivers were going "truck-to-truck" that day, something that he described as unusual.[13]

Driscoll testified that in addition to the one incident regarding Mace that he witnessed, he received multiple reports that Mace was not doing his job or was interfering with others. More specifically, Driscoll stated that over a 10-day period in late July 2008, he had received complaints about Mace from employees Scott Auger, Harold Baker, Mark Cinelli, Tony Mederios, and Tom Taft, and from Supervisor Roy Blakely.[14] As alluded to above, not one of the seven individuals named by Driscoll were called by the Respondent to testify about Mace's alleged infractions or about their conversations about Mace with Driscoll. Instead the Respondent relied on Driscoll's account of what they told him.

Driscoll stated that, Auger, a warehouse worker, complained that Mace was coming to the high volume section of the warehouse a couple of times a day, talking to employees, and that "they're not getting the product out fast enough." Driscoll testified that he told Auger that he would "talk to Derek [Mace] and tell him to stay out of there." Driscoll testified that Baker, a truckdriver said: "Dude, what's going on? I . . . got this guy from the warehouse that delivers milk in my truck, I'm trying to unload and . . . all he's doing is talking to me about Union. I kept saying 'Look, will you let me unload?'" According to Driscoll, Baker asked "Can you do anything about it?," and Driscoll responded: "I'll talk to him about staying off of the trucks. He can't stop you from working." Driscoll testified that Cinelli reported that Mace had started talking to him about the Union while in the breakroom and that Cinelli said he did not want to be involved and told Mace to "watch whas he was doing." According to Driscoll, Cinelli said that Mace continued the conversation and made Cinelli uncomfortable. Driscoll stated that he told Cinelli that Mace could talk to him during a break, but that Mace was "not supposed to be on break."

In addition, Driscoll testified that Mederios, a warehouse employee, approached him to talk about Mace in late June or early July 2008. In Driscoll's account, Mederios said: "I was trying to go to work, I was trying to get into the freezer and Derek [Mace] stopped me, he was talking to me about joining the Union. . . . I went to go into the battery room, he followed me in there." Driscoll testified that he asked if Mederios wanted to file a complaint about Mace, but Mederios did not choose to do so. Driscoll stated that he told Mederios that Mace "shouldn't be doing this while you're trying to work." Driscoll testified that Taft, a warehouse employee who unloaded trucks, complained that he was working when Mace approached him about the Union. Driscoll testified that Taft reported that he told Mace he was not interested in joining a Union, but that Mace subsequently approached him again while he was working. Driscoll said he asked Taft "Are you feeling threatened or is he stopping you from working?" and that Taft responded, "Well, every time I'm trying to work he's trying to talk to me about the Union, all I want to do is work."

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[11] There was evidence that Mace had had attendance problems in the past. The Respondent concedes that those prior attendance problems had nothing to do with Mace's suspension and termination.

[12] A pallet jack is a type of warehouse equipment used to lift and move product.

[13] Driscoll also testified that on one occasion he observed Mace near the sandwich line. Driscoll stated that Mace would have no work-related reason for being there unless he was loading trucks, and that on the day in question Mace was "doing milk." When pressed on cross-examination, however, Driscoll stated that Mace loads trucks on days when he is "doing milk."

[14] According to Driscoll, Blakely was a nonsupervisor when he made an earlier complaint about Mace, but was promoted before making his second, late July complaint.

Driscoll also testified that he had two conversations about Mace with Blakely—the first one when Blakely was a warehouse employee and the second after Blakely was promoted to a supervisory position. Driscoll stated that, on the first occasion, Blakely said that Mace had talked to him in the parking lot about the Union. Driscoll stated that, on the second occasion, Blakely reported that he was working when Mace said he had seen union officials the night before and that "management's screwed." According to Driscoll, Blakely reported that he responded to Mace by saying, "You know I'm a supervisor," and that Mace said he "d[id]n't care." Driscoll recounted that he told Blakely there was not much he could do unless Blakely made a formal complaint.

At trial, the Respondent submitted written statements from two of the individuals who Driscoll said complained about Mace. These statements—one from Taft and one from Blakely—are undated and both discuss Mace's union activity. The statement from Taft says that over the course of a "couple of days," Mace approached him to talk about the Union. At least one time this happened while Taft was picking product to fill an order. Taft states that he "just i[g]nored" Mace. In his written statement, Taft also informs on another employee who he said accepted a "paper for the Union." Taft's written statement does not claim that Mace interfered with work, that Mace himself was failing to complete his work, or that Taft found Mace threatening in any way. The statement from Blakely describes two occasions when Mace approached him about the Union. Blakely opposed the Union, and he recounted telling Mace why he would not support it. According to Blakely's statement, the first discussion occurred in the Respondent's parking lot and concluded when Blakely ended it. The second discussion took place inside the warehouse. The statement says that Mace said "the Union took him to dinner and that management will be screwed." According to Blakely, he responded that Mace was "full of shit." Blakely's statement says that when he told Mace that he "did not want to hear anymore," the discussion ended. The statement makes no mention of whether Mace and Blakely were on break during the second discussion or whether they were engaging in work activities while they talked. Blakely's written statement does not claim that Mace interfered with his ability to carry out work duties or that Mace was failing to complete his own work. Nor does Blakely state that he believed Mace was threatening him.[15]

Driscoll testified that, after suspending Mace, the Respondent investigated Mace's conduct by interviewing between eight and nine individuals. Once again, the Respondent did not present the testimony of a single one of those individuals, but rather relied on Driscoll's account of what they reported to him. Moreover, Driscoll stated that he did not memorialize any of his many interviews in writing or make a written report regarding the evidence collected in the investigation. Considering his failure to make any record of his investigation, Driscoll's testimony about what each employee supposedly told him was surprisingly specific. Driscoll testified that he talked to Baldack, a supervisor who reported that Mace "was in the pastry room, like four [or] five times I had to get him out [of] there today." Driscoll described a meeting with Dominic Statkus, who he described as a lead milk loader. Driscoll testified that, according to Statkus: "[Mace is] always trying to organize something, he's not where he's supposed to be. I got to go looking for him. A lot of times he's on the trucks just talking to the drivers. . . . Derek's holding . . . court in the pastry room a lot." Driscoll testified that he interviewed Marguerite McClellan, the lead person for picking pastries from the warehouse to fill orders. He asked McClellan what Mace had been doing and whether Mace had been causing problems for her. According to Driscoll, McClellan replied, "Yeah, [Mace is] always over here . . . slowing down the line or having meetings in the pastry room," and that "everybody was saying he was talking union." Driscoll also testified that he talked to Scott LaPlante, who assembled orders of high volume products. Driscoll told LaPlante that he had been receiving a lot of complaints about Mace and asked him "is there anything you would like to tell me about?" According to Driscoll, LaPlante responded: "Yeah, that guy's always down here to try and drum up votes for something. I keep walking away from him, he keeps following me . . . . I mean, the guy would follow you everywhere."

I conclude that Driscoll strained to portray any information he received about Mace's union activities in the light most favorable to the Respondent. For example, Driscoll testified that employees complained that Mace was interfering with their ability to work. However, neither of the two written "complaints" introduced as exhibits by the Respondent includes any mention of Mace interfering with the employee's work. To the contrary, Taft stated that he "just i[g]nored" Mace, and Blakely indicated that he chose when to end both conversations with Mace. I also found somewhat implausible Driscoll's testimony that he received multiple complaints about Mace interfering with other employees' work, given that he never warned Mace to discontinue such conduct prior to suspending/discharging him. Indeed, Driscoll himself said that he reacted to the complaints from Auger and Baker by promising to tell Mace to stay away from their work areas. Rather than having such a conversation with Mace, or giving Mace an opportunity to change his behavior, Driscoll jumped to the drastic measure of suspending/terminating Mace.

I also consider it telling that the Respondent failed to call a single one of the purported complaining individuals as witnesses. Two of those individuals, Baldack and Blakely, were current supervisors who one would assume to be favorably disposed towards the Respondent. Yet the Respondent did not call either individual as a witness, or explain its failure to do so. The Board has held that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1122–1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) (Table); *Electrical Workers Local 3 (Teknion, Inc.)*, 329 NLRB 337, 337 fn. 1 (1999); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) ("Normally it is within an administrative law judge's discretion to draw an adverse inference

[15] In Blakely's written statement, unlike in Driscoll's account of what Blakely said, there is no indication that Mace was aware of Blakely's recent promotion to supervisor.

based on a party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party . . . , particularly when that witness is the party's agent and thus within its authority or control."). For the reasons discussed above, I find that the Respondent has not shown that Driscoll received complaints that Mace was intimidating, or interfering with the work of, other workers, or that Mace was failing to perform his own work.

Driscoll also testified about the policy on solicitation and distribution that the Respondent forwards as a basis for Mace's termination. There was no evidence showing that this policy existed prior to the union campaign or that it was set forth in written form. Indeed, Driscoll admitted that, prior to Mace's termination, he had never disciplined, much less terminated, an employee for engaging in solicitation or distribution, even though the evidence showed that nonunion solicitation and distribution was commonplace. Not only was no written policy produced, but the Respondent's officials did not describe the purported policy on solicitation and distribution with any consistency. During the meeting that Donahue (director of operations) held with warehouse employees in July 2008, he warned that "there should be no union activity on the property," and that such activity was a "terminatable offense." Driscoll, on the other hand, stated that it would not be a violation of the policy for two employees to discuss the Union when they were on break or when they were performing work tasks, side-by-side, in the warehouse. Driscoll did not clearly state what would constitute a violation of the purported policy on solicitation and distribution, but he did indicate it was impermissible for an employee to engage in any solicitation that interfered with other employees' performance of their work duties.

E. Crane Receives Written Warnings

As discussed above, Crane was a truckdriver who assisted the Union by distributing union authorization cards and literature, talking to employees about the Union, signing a union card, and attending a union meeting. Crane also spoke during the July 11 meeting that the Respondent held with drivers to campaign against the Union. At that meeting, Crane complained that the Respondent was not paying the drivers to attend the meeting. When Donahue asked why employees would want union representation, Crane responded by raising the Respondent's inattention to a safety issue. Crane's union support was public enough that, in August, an antiunion employee (Belanger) confronted Crane about the Union. When Crane later tried to explain his position to Belanger, Belanger walked away and went to talk with Driscoll.

Crane began working for the Respondent as a driver in September 2007, and, prior to September 2008, had never received a disciplinary write-up of any kind from the Respondent.[16] On September 14, Crane received two written warnings simultaneously. The first concerned a 6-week old incident in which Crane allegedly violated security policy by entering a Starbucks store to make a delivery at a time when the store's safe was open. The incident occurred on July 29, and was reported to the Respondent on July 30. According to the Respondent's records, store personnel complained that Crane was discourteous when asked to wait outside until the work regarding the safe was completed and the safe was locked. The Respondent did not explain why the Respondent issued this discipline so long after the incident. The second write-up that the Respondent issued to Crane on September 14, was based on a complaint from store personnel that Crane was throwing cases of product from his truck and being unpleasant to staff on September 4. Crane denied throwing product. According to him, the truck was so overloaded that when he opened the door, some of the product fell out on its own.[17] None of the product was damaged. Crane testified that no one from the store had spoken to him about throwing or dropping product. Crane was the only witness to this incident who testified.

A few days after the two September 14 write-ups, Crane received a third write-up. This one concerned a September 8 incident that took place at the Respondent's warehouse after Crane had completed his route and was removing empty trays from his truck. The Respondent's disciplinary report states that Crane had thrown trays in the way of warehouse workers who were unloading incoming product. According to the disciplinary write-up, Crane cursed at the warehouse workers and stated "I do not get paid by the hour and I worked more than 10 hours today." Crane told a warehouse supervisor that he should direct the warehouse workers to stay out of the way. Crane admitted to making statements along the lines of those described in the write-up and to using the word "fuck" during the exchange with the nonsupervisory warehouse workers. However, he testified that the incident was precipitated when Taft, a warehouse worker who strongly opposed the Union,[18] repeatedly backed a pallet jack into the empty trays as Crane was attempting to unload them from his truck. Crane testified that a second warehouse worker stopped just short of running into him with a pallet jack. Crane reported this incident to two warehouse supervisors, and told one that he should keep the warehouse workers out of the way. Aside from Crane, no witness to this incident was called to testify.

Driscoll admitted that the Respondent rarely issued written warnings to employees based on store complaints such as those received about Crane. The record evidence confirms this. It shows that the Respondent rarely if ever disciplined other drivers when store personnel complained about conduct comparable

[16] I credit Crane's reliable testimony that the September 14, 2008, write-ups were the first he had received from the Respondent. Tr. at 151–152. Driscoll offered testimony on the subject that was arguably contrary to Crane's, but his testimony was less consistent than Crane's and is outweighed by it. At first, Driscoll testified that he did not think Crane had been disciplined previously. Then he said he thought Crane had previously been disciplined, but he could not remember what conduct Crane had been disciplined for. Tr. at 498–499. The Respondent did not introduce documentation showing that Crane received discipline prior to September 2008.

[17] Crane drove one of the straight trucks, although he was qualified to drive one of the larger tractor-trailer trucks.

[18] The record reveals that this is the same Tommy Taft who made a report to the Respondent concerning Mace's union activity. Although the record indicates that the Respondent has two employees named Tommy Taft, only one of those individuals worked in the warehouse and the individual who had the run-in with Crane was a warehouse worker.

to Crane's. The first write-up Crane received states that he breached security policy by entering a store when the safe was open. The record shows that during the period from October 2006, until Crane's discipline on September 14, 2008, there were numerous occasions when drivers breached security policy by failing to relock a store's door and/or failed to reset the store's alarm after completing a delivery. The Respondent's record of store complaints, includes the following reports: "door not locked; alarm not set" (11/6/07); "store called in, their alarm was not set" (11/23/07); "f[ront]o[f] h[ouse] door left open" (12/16/07); "driver did not lock the front door after he made the delivery" (3/28/08); "store called in to report that the driver left their side door open and the alarm went off and the police came" (5/10/08); "store reported that their front door was left unlocked last night" (5/14/08); "keys left in front door . . . alarm not set" (5/16/08); "driver did not shut off or arm the alarm . . . it was tripped" (5/26/08); "alarm not being set for last 3 nights," (6/6/08); "both sets of doors were left unlocked last night" (7/31/08); "alarm not set" (8/11/08); "front door was left unlocked last night" (9/5/08); "door was unlocked when [store personnel] arrived" (9/13/08). Although the Respondent's record of store complaints contains a space to enter the "action" taken with respect to each complaint, no disciplinary action is reported for any of these incidents. Indeed, Driscoll was unable to recall any discipline for these incidents, although he testified that he believed a driver who left the keys to a store hanging in its door after completing a delivery received discipline.

Regarding the complaint that Crane was discourteous to store staff, the evidence indicates that such complaints about other drivers were also common. The Respondent's records for 2008 show that store personnel complained that: on 4/28, a driver "had words" with a store employee while making a delivery; on 6/19, a driver engaged in "rude behavior" after delivering a broken, soaked, and incomplete order; on 6/20, a driver was "confrontational" with store employees and refused to put the delivery in the proper location; on 8/26, a driver was uncooperative with store personnel about an incorrect delivery; and on 8/26, a driver was "unpleasant" and mishandled the store's pastry order. However, neither the Respondent's report of store complaints nor the disciplinary records introduced at trial list any action for the incidents of discourtesy described immediately above. The Respondent did not claim that the employees involved in these other incidents of discourteous conduct were disciplined. Driscoll remembered the incident regarding the driver who engaged in "rude behavior" with store staff on June 19, and admitted that the employee was not disciplined.

The Respondent does identify one driver who received warnings for discourteous conduct in November and December 2007. The driver in that case, Ed Cassady was reported to be discourteous to a Starbucks *district manager*, not, like Crane, to store employees. Moreover, the store had complained that Cassady wore clothes that exposed his tattoo of a topless woman even after the Respondent discussed the tattoo with Cassady. In one instance, Cassady blocked a store customer's car with his truck, refused to move the truck when the customer asked him to do so, and appeared indifferent to the trouble he was causing the customer. The record does not show that anyone was disciplined for discourteous conduct during the 18 months between when Cassady was disciplined and when Crane was disciplined, or ever during the period after Driscoll arrived to manage the facility. This is true despite the multiple complaints of discourteous conduct by other drivers that are documented in the exhibits covering the period close in time to when Crane was warned. Driscoll testified that the Respondent's policy is that drivers must be courteous and helpful with store personnel. On its face this is obviously a reasonable policy, but the record does not show that the Respondent applied the policy to other drivers in the same way as it did to Crane.

The second disciplinary write-up received by Crane concerned an incident in which store personnel reported that Crane had thrown product from his truck. As discussed above, Crane testified that he did not throw the product, and there is no dispute that the product was undamaged. At any rate, the record reveals that the Respondent receives store complaints about mishandled and damaged product on almost a daily basis. The incidents of this referenced in the record are too numerous to recount here, but include the following: "driver broke gallon of milk & half & half; did not tell anyone about it and did not clean it up" (10/6/07); "the driver left their . . . fridge open[;] all was lost" (12/26/07); " fridge left open; all was lost" (2/28/08); "received pastries that were crushed due to double stacking" (3/13/08); "this driver for the 2d time has left their fridge door open and all breakfast was lost plus their paper order has been thrown all over the place" (3/31/08); "driver setting heavy items on top of lunch items crushing product; happening frequently" (7/20/08); "poor deliveries; products smashed; product not in totes or trays" (8/26/08); "[driver] mishandling their pastry" (8/26/08). The Respondent's record of store complaints does not include an "action taken" entry for any of these complaints. The Respondent did not claim, much less prove, that any of the drivers involved with these deliveries were disciplined. Indeed, Driscoll conceded that during his tenure the drivers had never been disciplined because they made deliveries that were damaged due to how the product was stacked, and that he did not know of any drivers who were disciplined for delivering damaged product during the period from April to September 2008.

Crane's third write-up concerned his run-in with Taft and another warehouse worker. The Respondent does not explain why the Respondent chose to discipline Crane, rather than the other participants, for the incident. It was Crane who complained to supervisors about what had transpired, not the other employees who had complained about Crane. It is true that Crane used an expletive during the exchange with Taft, but witnesses for both sides agreed that employees working at the Respondent's facility used such language on almost a constant basis. Driscoll admitted that other employees used expletives during arguments with one another, but that he had never disciplined anybody for this until he disciplined Crane. Transcript at 539–540.[19] Indeed, in the written statement that Blakely

[19] The record shows that one individual, who had previously received training on sexual harassment, was given a written warning after he continued to use language that the Respondent said could be considered sexually harassing. In this case there is no suggestion that Crane

gave to the Respondent, he reported that he had called Mace "full of shit," but it was Mace, not Blakely, who was disciplined as a result of that exchange.

In its brief, the Respondent claims that the third warning was for inappropriate behavior towards a coworker and supervisor. After carefully reviewing the record evidence on this subject, I conclude that the stated reason for this discipline was Crane's conduct towards the coworkers, and that the record does not establish that he engaged in insubordinate behavior or that his complaint to the warehouse employees' supervisors was a basis for the discipline. The disciplinary report notes that Crane "approached [the supervisor] demanding that he should get the [coworkers] out of his way," but does not substantiate that his exchange with the supervisor, as opposed to his exchange with the coworkers was a basis for the discipline. In the disciplinary report regarding this incident the lines for "carelessness," "safety/work habit," "conduct," and "copolicy/other" are all checked as reasons for the discipline, but the line for "insubordination" is not checked. See *ADB Utility Contractors*, 353 NLRB No. 21, slip op. at 1 (2008) (an employer fails to meet its burden of showing that it would have taken the same action absent the discrimination, when the evidence establishes that the reason forwarded was not in fact relied upon); *Structural Composites*, 304 NLRB 729, 729–730 (1991) (not enough to show that it could have taken the action it did for the reasons given, rather must show that it would have taken the action for the reasons given).

F. Beattie, Adorno and Glover Discharged from Positions as Drivers

On September 15 and 16, the Respondent terminated drivers Beattie, Alexander Adorno, and Anthony Glover. The reason the Respondent gives for this action was that, as of September 15, every one of its drivers was required to have a Class A commercial driver's license (Class A CDL or Class A license), and each of these drivers had only a Class B commercial driver's license (Class B CDL or Class B license). Two of the drivers, Beattie and Adorno had obtained Class A permits, but not licenses, as of the time the Respondent informed them that they were being terminated. Adorno and Glover asked Driscoll whether they could have additional time to satisfy the new licensing requirement, but Driscoll denied their requests. Driscoll offered all three drivers continued employment, but as warehouse workers rather than drivers.[20] This change in assignment would result in a significant decrease in pay since, as drivers, these employees had been paid by the "trip" at an approximate rate of $23 to $26 per hour, while as warehouse employees they would earn $12 to $13.50 per hour.[21] None of the three drivers accepted the offer of a position in the warehouse on a permanent basis, and only Beattie agreed to work out the week in the warehouse.

The General Counsel argues that the Respondent imposed the Class A CDL requirement to eliminate Beattie—the prime mover of the union effort—from its work force and that Adorno and Glover were "swept up in [the] negative employment action as cover for the discriminatorily motivated act." The Respondent counters that Beattie's union activity played no part in the imposition of the new requirement. Driscoll denied that Beattie's union activity was a factor. The Respondent argues that the evidence shows that the new licensing requirement was necessitated by the expansion of the Respondent's business, and that the drivers were given advance notice and offers of assistance designed to make it possible for them to obtain the Class A licenses in time to continue working for the Respondents as drivers.

When questioned about the decisionmaking process that led to the Respondent's adoption of this new licensing requirement for drivers, Donahue was able to testify in only the vaguest of terms. He stated that he probably engaged in one phone conversation with "officials" in the Respondent's Maryland office on the subject. Regarding the question of when the decision was made, Donahue could not be more specific than to narrow his answer to a 3-month period, stating "back in May–April, May, June in that area." When asked who made the ultimate decision he was again quite vague, responding that it was a "collaborative effort on all parts." He testified that he made the decision along with "my team in Maryland and [Driscoll] and my team here." Later, when pressed, he stated that the discussions were "mostly probably by phone," and that he spoke to one person in "corporate." There are no documents regarding the meetings that led to the decision or of any proposals or rationales that were considered.

The record shows that when the Respondent began operations it hired drivers who had either a Class A license or a Class B license. The main difference between these two categories of drivers is that those with Class A licenses are permitted to drive either tractor-trailer trucks or straight trucks, whereas those with Class B licenses are only permitted to drive straight trucks. A tractor-trailer is a truck with two discrete elements—the tractor that tows a trailer, and the trailer that holds the cargo. A straight truck, on the other hand, is one unit with the tractor and cargo compartment mounted on the same chassis. The Respondent has used both tractor-trailers and straight trucks, but the tractor-trailers have far more cargo space.[22] The Respondent no longer operates straight trucks for store routes. Two straight trucks are still regularly used to pick up fresh sand-

used the expletive in a way that the Respondent considered, or which one could reasonably consider, sexual harassment.

[20] Driscoll testified that he offered to retain all three drivers as warehouse workers, and Beattie and Glover each corroborated that Driscoll had made such an offer. Adorno stated that Driscoll told him he would have to apply for the warehouse position. I credit Driscoll's testimony that he offered all three drivers, including Adorno, the warehouse position, not just the opportunity to apply for it. Driscoll testified reliably on that point and his testimony was lent credence by that of Beattie and Glover. The record does not suggest any reason why Driscoll would offer the warehouse positions to Beattie and Glover, but require Adorno to apply for such a position.

[21] The warehouse work would be at the drivers' current rate of pay for the rest of the week, but after that they would earn what warehouse workers were paid.

[22] The storage compartment of the Respondent's trailers is generally 36-feet long, whereas the storage compartment on the straight trucks is only 20- to 24-feet long. The cargo compartments of the trailers are also 9 inches wider than the cargo compartments of the straight trucks.

wiches and pastries and bring them back to the Respondent's Canton facility.

By the end of August 2008, all but three of the Respondent's 50 to 55 truckdrivers had Class A licenses. The only drivers still working with Class B licenses were Adorno, Beattie, and Glover. During their 2007 performance reviews, each of these drivers mentioned upgrading to a Class A license as a goal for the coming year. In July 2008, the Respondent told Adorno, Beattie, and Glover to obtain permits to learn to drive Class A trucks. In order to obtain the permit these drivers would have to pass a written test and undergo a background check. According to credible testimony, this test is not particularly difficult to pass, requiring that the driver study approximately 6 pages worth of material, and then answer 16 out of 20 multiple choice questions correctly. The Respondent also told the drivers that they had to obtain Class A *licenses* by September 15, 2008, but the parties dispute whether this requirement was communicated in the first part of July 2008 or in early September 2008. To obtain a Class A license an individual must demonstrate familiarity with various parts of the tractor-trailer, correctly perform several driving maneuvers, and then pass a road test.

The parties presented a great deal of evidence regarding the factual question of whether it was on July 11 or on September 4 that the Respondent announced the September 15 deadline for obtaining Class A licenses. This factual dispute is a significant one. Two weeks is, by all accounts, an insufficient amount of time for a driver with a Class B license to train for, and obtain, a Class A license. Therefore, if the Respondent did not inform the drivers of the September 15 license deadline until early September it would lend credence to the General Counsel's contention that the Respondent imposed the new licensing requirement not because it hoped the Class B drivers would meet it, but so that Beattie could not meet it.

On the other hand, if the drivers were given from July 11 until September 15, the implications are more complicated since that is a short, but not necessarily unworkable, time period. The General Counsel presented credible testimony that the Union's own educational program requires a candidate for a Class A license to train 20 hours a week for between 6 and 8 weeks, and is rarely completed by anyone working full-time. Most courses require a total of between 120 and 160 hours of training. In addition, the individual would have to begin by taking and passing the written permit examination. Commercial driving schools charge $5000 or more to train individuals to become Class A licensed drivers. The Respondent, in an effort to show that a motivated full-time driver could meet the requirements within the time it was allowing, presented the testimony of Carlos Marques. Marques was a Class B driver with the Respondent who obtained a Class A permit in April. He presented himself to take the test after approximately 5 weeks of training, but was unable to proceed with the test at that time because of equipment problems. He presented himself to take the test again shortly thereafter, but again equipment problems prevented him from going forward. In July, Marques took the driving test for a Class A license and passed it. It cost Marques only $90 to obtain his Class A license because of the assistance provided by the Respondent.

The parties presented conflicting testimony regarding the timing of the notification. Driscoll testified that in July 2008, he met with Adorno, Beattie, and Glover, and informed them that they had to obtain Class A licenses by September 15 in order to continue their employment as drivers with the Respondent. He testified that he told the drivers that the Respondent would provide training and other assistance to help them obtain the licenses. Driscoll also testified that on July 12, he posted the memorandum (dated July 11) from David Robitaille (transportation manager), which stated that, after September 15, 2008, the Respondent would only employ drivers with Class A licenses. This requirement was being imposed, the memorandum explained, "[i]n order to meet the delivery requirements of Starbucks." The memorandum urged the drivers to obtain a Class A permit "as soon as possible." The memorandum further stated that after a driver obtained the Class A permit, the Respondent would help the driver obtain the Class A license by: having its experienced Class A-licensed drivers provide training to the Class B-licensed drivers; making tractor-trailers available to drivers so that they could practice driving skills when they were off-duty; providing a tractor-trailer for the driver to use during the road test; arranging to have the driver accompanied to the road test by a "sponsor" driver who had a Class A license; paying the cost of the driver's first road test for the Class A license; and paying the cost of additional road tests if the individual failed because of a problem with the equipment provided by the Respondent. Driscoll testified that he posted the memorandum from Robitaille on the door to the dispatch room where drivers came for their paperwork and that the memorandum was also posted on the door to the drivers' breakroom. These were locations where notices to drivers were typically posted. According to Driscoll, the memorandum was still posted in September 2008.

Driscoll's testimony regarding the timing of the notice was corroborated to a significant extent by that of Marques. Marques testified that in July 2008 he saw the July 11 memorandum from Robitaille posted on the door to the "driver's room" where the drivers came for their paperwork. As discussed above, that memorandum stated that each of the Respondent's drivers would have to obtain a Class A driver's *license* by September 15. The testimony of Driscoll and Marques regarding the July posting of the memorandum dated July 11 is further supported by the testimony of Donahue, who stated that he saw the July 11 memorandum posted in early July.

At trial, Adorno, Beattie, and Glover all denied that the Respondent notified them of the impending Class A license requirement in July. They testified that during the July discussions, Driscoll said it would be sufficient to obtain a Class A *permit* by September 15. Beattie stated that Driscoll told him this immediately following the July 11 meeting that the Respondent held to urge drivers not to support the Union. Adorno, Beattie, and Glover testified that it was not until approximately September 4—less than 2 weeks before the deadline—that Driscoll said they would have to obtain Class A *licenses* by the deadline. In addition, Beattie and Glover testified that although the memorandum stating that drivers had to have Class A licenses by September 15 was dated July 11, it was not

until September that they saw any version of that memorandum.

After considering the record evidence and the demeanor of the witnesses, I credit the testimony of Driscoll, Marques, and Donahue that it was early in July 2008 when the Respondent announced that all drivers would have to have a Class A license by September 15. Driscoll testified that in July he personally provided oral notice of the change in license requirements to the three drivers and that on July 12 he posted the July 11 memorandum regarding the change where that memorandum would be seen by drivers. His testimony on these points was clear, certain, and consistent, and was not impeached. Marques testified under subpoena from the Respondent and was not shown to have taken any position regarding the Union or to have a personal interest in the outcome of this proceeding. His demeanor was calm and measured and his credibility was not undermined in any meaningful way.

The contrary testimony that was provided by the alleged discriminatees regarding the timing of the notice provided to the drivers was less credible. Some of that testimony was inconsistent or was impeached significantly. For example, when Glover gave his initial affidavit to the Board he stated, contrary to his later trial testimony, that *in July 2008*, Driscoll told the drivers that they had to obtain Class A *licenses* by September 15. In fact, in his affidavit, Glover twice mentions July as the month when the Respondent notified him about the new licensing requirement. Thus the account in Glover's initial affidavit actually lends corroboration to the testimony of Driscoll and Marques. When cross-examined about the change in his recollection, Glover's only explanation was that he had shown the affidavit to Beattie and that Beattie had "refreshed in [his] mind" that the conversation about Class A licenses had actually taken place in September. Glover testified that he had shown his affidavit to Beattie because they were "all in this together." I consider Glover's recantation of this significant element in his affidavit suspect, especially considering that the affidavit was given on October 21, 2008, relatively close in time to the events at issue, that the July notification was mentioned twice in the affidavit, and that Glover's change of heart was brought about by Beattie's examination of the affidavit. Glover's prior affidavit significantly undermines the credibility of his trial testimony on this subject, and leaves that testimony far less credible than the contrary testimony of Driscoll, Marques, and Donahue.

Glover's testimony was also internally inconsistent and uncertain in other respects. For example, when testifying about the July meeting between Driscoll and the three drivers, Glover stated that Driscoll had specifically been asked whether he was talking about Class A licenses or only Class A permits, and had answered that the drivers only needed the permits. When Glover was asked if he was the one who posed that question to Driscoll, he answered ambiguously, "Yes, it was all of us." When pressed on the subject he shifted and said that it was not himself, or "all of us," but Beattie, who had asked the question. All in all, I was left with the impression that Glover was straining to provide testimony on this subject that was favorable to his own interests and the General Counsel's case.

Adorno appeared ill-at-ease and uncertain on the stand when testifying about the timing of the notice regarding the new license requirement. He testified that he was not told about the Class A license requirement until 2 weeks before the September 15 deadline, but when shown a version of the Robitaille memorandum, dated July 11, which set forth the requirement, Adorno was initially unable to say when he had first seen the memorandum, stating: "The date I'm not sure. I can't recall exactly when I got this, but I do remember receiving it though." When asked whether he remembered seeing the memorandum posted on the door to the drivers' room, Adorno did not deny seeing it, but rather answered, "I can't recall, sorry." He also gave inconsistent testimony on other matters. For example, he first stated that he had not been told about the availability of company-provided training for the Class A license in the summer of 2008, then stated that he had been told about the availability of such training in July 2008, and then stated that it was "like a little bit before September 2008." Transcript at 250–251, 257–258. Similarly, Adorno initially denied that after he obtained his Class A permit the Respondent placed him in a tractor-trailer with a Class A driver, but then, when questioned further, he conceded that the Respondent had done that. Transcript at 252–253. Based on these factors, and the record as a whole, I do not believe that Adorno was a reliable witness on the question of when the Respondent announced the new licensing requirement.

I also found Beattie less credible than Driscoll and Marques on the subject of when the drivers were notified that they would be required to obtain Class A licenses. Beattie testified in a very guarded manner. With unusual frequency he couched his answers as being "to the best of my recollection" or merely "my recollection."[23] In other instances he appeared more interested in disagreeing with the Respondent's counsel than in answering questions forthrightly.[24] Moreover, Beattie's testimony that in July he was told that he only needed to get a Class A permit by September 15 does not ring true. If that were the case I would have expected Beattie to have obtained a Class A permit by the September 15 deadline. By his own admission, however, Beattie did not obtain either a Class A license or a Class A permit by the deadline, but rather obtained the permit on September 16—a day past the deadline, and only after the Respondent enforced the deadline with respect to Adorno and Glover on September 15.[25] Overall, I was left with the impression that Beattie allowed his personal stake in the outcome of

[23] See, e.g., Tr. at 26, L. 7; Tr. at 31, L. 6; Tr. at 37, L. 1; Tr. at 52, L. 19; Tr. at 66, LL. 1, 4 and 20; Tr. at 84, L. 13.

[24] See Tr. at 82 (in discussing training that the Respondent offered drivers, Beattie first states that Driscoll offered training on "all aspects" of tractor-trailer driving and when Respondent's counsel seeks to confirm this, Beattie retracts that testimony, stating "not on all aspects"); Tr. at 88, LL. 1 and 12–14 (Beattie first states that a driver must learn four driving maneuvers in order to qualify for Class A license, and when his testimony is stated back to him by counsel for the Respondent, Beattie says "I think there's more than four").

[25] On September 15, the Respondent informed Adorno and Glover that their employment as drivers was terminated because they had not obtained Class A licenses. Beattie was not at work on September 15. Although the Respondent's personnel records state that Beattie was terminated on September 15, the parties agree that the Respondent did not inform him of this until Beattie appeared for work on September 16.

the union campaign and this adjudication to influence his recollection, and I consider his testimony on this subject to be less reliable than that of Marques, Driscoll, and Donahue.

The General Counsel urges me to draw an adverse inference from the Respondent's failure to call Robitaille to testify regarding what the company communicated to the drivers in July about new licensing or permit requirements. At the time of trial, Robitaille was no longer working for the company in any capacity. An adverse inference is only proper if it can reasonably be assumed that Robitaille was favorably disposed to the Respondent. See *International Automated Machines, Inc.*, 285 NLRB at 1123. Given that Robitaille no longer works for the Respondent, and the lack of evidence regarding the circumstances of Robitaille's separation from the company, I do not assume that he was favorably disposed towards the Respondent at the time of trial. Therefore, I decline to draw any inference based on the Respondent's failure to present Robitaille as a witness. See *Reno Hilton*, 326 NLRB 1421, 1421 fn. 1 (1998), enfd. 196 F.3d 1275 (D.C. Cir. 1999), and *Goldsmith Motors Corp.*, 310 NLRB 1279, 1279 fn. 1 (1993). I note, moreover, that the General Counsel did not call a single employee, other than the alleged discriminatees, to prove its contention that the July 11 memorandum was not published to employees in July, as testified to by Driscoll, Marques, and Donahue.[26]

G. The Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1): in about July 2008, when Driscoll interrogated employees about union activities and created the impression that union activities were under surveillance; on about July 24 and August 4, 2008, when Driscoll and Baldack interrogated employees about union activities. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act: on about July 24, 2008, when it suspended Mace because it mistakenly believed that he was engaged in unprotected conduct while he was engaged in union and other protected concerted activities or, in the alternative, because Mace and other employees engaged in union and concerted activities and in order to discourage such activities; on about August 4, 2008, when it terminated Mace because it mistakenly believed that Mace was engaged in unprotected conduct while he was engaged in union and other protected concerted activities or, in the alternative, because Mace and other employees engaged in union and concerted activities and in order to discourage such activities; on about September 4 and 9, 2008, when it issued warnings to Crane because he and other employees formed, joined, or assisted the Union and engaged in concerted activities and in order to discourage such activities; on about September 15, 2008, when it informed Adorno, Beattie, and Glover that they could no longer be employed as drivers, but could remain with the Respondent as warehouse workers for significantly lower compensation because those individuals, and other employees, engaged in union and concerted activities, and in order to discourage such activities.[27]

Analysis and Discussion

I. SECTION 8(a)(1)

A. Interrogations

The General Counsel alleges that the Respondent coercively interrogated employees in violation of Section 8(a)(1) on multiple occasions in July. An interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292–293 (1990). Relevant factors include, whether the interrogated employee was an open or active union supporter, whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18–19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177–1178 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

1. Driscoll Questions Glover: The General Counsel alleges that the Respondent engaged in an unlawful interrogation in July when Driscoll contacted Glover by phone while Glover was driving his route and asked Glover to divulge what he knew about the conversations Beattie was having with other drivers. I agree that this was an unlawful interrogation. I note that Driscoll was not Glover's direct supervisor, or even the transportation manager, but a higher level official to whom Glover's direct supervisors reported. The Board has viewed the fact that an interrogator is a high-level supervisor as one factor supporting a conclusion that the questioning was coercive. See, e.g., *Stoody*, supra. Moreover, it was unusual for Driscoll to phone Glover while he was driving his route, much less to do so to talk about something other than deliveries. The fact that the questioning took place while Glover was driving exacerbated the coercive nature of the interrogation because it meant not only that Glover was isolated from other employees, but also that he had to formulate a response while continuing to operate his truck.

Driscoll did not mitigate the coercive nature of the interrogation by offering Glover assurances that the purposes of the inquiry were benign or that the way he responded would not result in adverse consequences for Glover or others. To the contrary, Driscoll tightened the screws by warning Glover to be "real frank . . . real serious" in his answers. This would reasonably suggest to Glover that the Respondent was considering taking some action based on Beattie's activities and that how

[26] In its brief, the General Counsel urges me to find, based on some feint markings on the document, that the July 11 memorandum was fraudulent and was "manufactured after the fact to try to justify the retaliatory imposition of a strict September 15 deadline for obtaining the Class A licenses." That serious charge is not supported by record and is rebutted by Marques' credible testimony that he saw the July 11 memorandum posted in July.

[27] The complaint, as issued by the Regional Director, also included multiple allegations that the Respondent had unlawfully disciplined employee Lucknerson Medy. When the trial opened, I granted the General Counsel's unopposed motion to remove those allegations from the complaint.

Glover answered could likely have consequences for himself or others.

In reaching my conclusion that the questioning unlawfully interfered with protected union activity, I considered that Driscoll did not specifically mention union activity when he asked about Beattie's conversations with drivers. However, it was common for employees to discuss nonwork matters while working at the Respondent's facility and the record suggests no reason, other than a desire to find out more about the recently discovered union campaign, for Driscoll's decision to single out Beattie's conversations with other drivers as the subject of an interrogation. Nor did Driscoll claim that he had reason to believe that Beattie's conversations with the other drivers were unprotected. In addition, Glover was a friend of Beattie's who, by approximately the time of Driscoll's phone call, was aware of the union campaign. Such an employee would reasonably understand that the reason Driscoll asked about conversations a leader of the union campaign had with other employees was that Driscoll was attempting to uncover information about the union activity. Given the totality of the circumstances, I conclude that Driscoll's interrogation of Glover reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.[28]

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) in July when Driscoll coercively interrogated Glover about Beattie's conversations with other drivers. See *Gardner Engineering*, 313 NLRB 755 (1994) (employer violated the Act by interrogating an employee who was not an open union supporter about the union activity of others).

2. Driscoll Questions Mace: The General Counsel also alleges that the Respondent coercively interrogated Mace in violation of Section 8(a)(1) when Driscoll questioned him on July 24, and again the following week. I conclude that the General Counsel has established this violation as well. The Respondent's questioning of Mace directly concerned, and sought information about, Mace's union activities. Under the circumstances, Mace would reasonably find this questioning coercive and intimidating. First, the interrogating individual—Driscoll—was a high level official to whom Mace's supervisors reported. The questioning took place in the office of Donahue, the highest ranking official at the Respondent's facility. It was held in the presence of a second supervisor and out of the presence of other employees. Driscoll injected a hostile tone into the interrogation—stating that he knew Mace was organizing for the Union and then linking that union activity to accusations of misconduct. Moreover, at the time of the interrogation, Mace had chosen not to reveal his union views to the Respondent. Although he was a leader of the campaign, Mace did not wear or display union paraphernalia and during the meeting with Driscoll he tried to keep his union activity secret from the employer by stating that he had "nothing to do with the Union."

Driscoll's questioning of Mace during the following week was in certain respects more coercive than the July 24 interrogation. By then, Driscoll had informed Mace that the Respondent was considering "further disciplinary action up to and including dismissal." Thus Mace entered the interview with the knowledge that his continued employment was hanging in the balance. Although Driscoll testified that the purpose of the meeting was to hear Mace's side of the matter, no witness recounted any questions directed to that subject. Rather, Driscoll again took a hostile tone—stating that Mace had lied, and, in particular, that Mace had lied about "looking for union votes" and handing out literature. The fact that Mace had untruthfully claimed that he had no involvement in the union campaign does not change the coercive character of the questioning. Indeed, the coercive nature of the questioning is underscored by the fact that Mace was fearful of acknowledging his protected activity to Driscoll. See *United Services Automobile Assn.*, 340 NLRB 784, 794 (2003), enfd. 387 F.2d 908 (D.C. Cir. 2004). Applying the relevant factors, I conclude that Driscoll's questioning of Mace was unlawfully coercive.[29]

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) when Driscoll coercively interrogated Mace on July 24, and again approximately 1 week later.

B. Impression of Surveillance

The General Counsel alleges that when Driscoll phoned Glover to talk about Beattie, he not only engaged in an unlawfully coercive interrogation, but also unlawfully created the impression of surveillance. "When an employer creates the impression among its employees that it is watching or spying on their union activities, employees' future union activities, their future exercise of Section 7 rights, tend to be inhibited." *Robert F. Kennedy Medical Center,* 332 NLRB 1536, 1539–1540 (2000). Therefore, an employer violates Section 8(a)(1) by creating such an impression. Id. The employer's conduct is evaluated from the perspective of the employee and is unlawful if the employee would reasonably conclude from the statement in question that employees' protected activities were being monitored. *Rogers Electric, Inc.,* 346 NLRB 508, 509 (2006); *Robert F. Kennedy Medical Center,* 332 NLRB at 1540; *Tres Estrellas de Oro,* 329 NLRB 50, 51 (1999).

As discussed above, even though employees routinely engaged in nonwork discussions while working, Driscoll singled out conversations that Beattie, the lead union organizer, was having with other drivers and took the unusual step of calling Glover to ask what those conversations were about. An employee in Glover's position—who knew about the union campaign and was a friend of Beattie's—would reasonably assume that Driscoll was asking about Beattie's conversations with other drivers because the Respondent had information regarding Beattie's role in the union campaign and was keeping an eye on him. Cf. *Central Valley Meat Co.*, 346 NLRB 1078, 1080 (2006) (where employer knew about the prounion sentiments of the employee, supervisor's questions about the subject

[28] In its brief, the Respondent does not make any legal argument supporting its position that this, and the other discussions with employees, did not violate Sec. 8(a)(1). Rather, the Respondent sets forth the general standard for finding an 8(a)(1) violation, and summarily states that there is no evidence of such violations. R. Br. at pp. 33 and 40.

[29] I reject the notion that the Respondent was simply investigating complaints that Mace had intimidated or interfered with other workers, since, as discussed above, the evidence did not establish that the Respondent received such complaints.

matter of union meetings reasonably created the impression that employee's union activities were being watched). Driscoll did not claim, either in his conversation with Glover or at trial, that he learned of Beattie's conversations with drivers from employees who had freely reported it, rather than through surveillance. Driscoll did not tell Glover, or claim at trial, that there was some reason, other than a desire to gather intelligence about Beattie's union activities, for the questioning. Under these circumstances, I conclude that Driscoll's questioning of Glover created the impression that the employees' union activities had been placed under surveillance by the employer.

For these reasons, I conclude that the Respondent violated Section 8(a)(1) by creating the impression that it had placed the employees' union activities under surveillance.

The General Counsel also alleges that the Respondent unlawfully created the impression that it had placed union activities under surveillance when Driscoll interviewed at least 14 individuals about Mace's conversations with other employees. However, the General Counsel presented no evidence about those interviews. The only evidence regarding how those interviews were conducted was Driscoll's testimony. In Driscoll's telling, he was not the one to broach the subject of union activity with any of these individuals, but simply received, or inquired about, reports that Mace was not working and was interfering with the work of others. The General Counsel invites me to conclude that Driscoll's version should not be credited, and, as discussed above, I do not credit his account of these interviews. However, since the General Counsel did not introduce any countervailing accounts, I am left without an adequate basis for finding what actually *did* happen during the interviews and, so, cannot determine that the interviews created the impression of surveillance. At any rate, I need not reach the question of whether those interviews unlawfully created the impression of employer surveillance, since I have already found that the Respondent's questioning of Glover constituted such a violation, and additional findings relating to the interviews about Mace would be cumulative and would not affect the remedy. See *Wisconsin Porcelain Co.*, 349 NLRB 151, 153 fn. 11 (2007); *DaimlerChrysler Corp.*, 344 NLRB 1324, 1324 (2005).[30]

II. SECTION 8(a)(3)

A. Mace Suspended and Terminated

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) when it suspended and then terminated Mace. As discussed above, Mace was the leader of the union campaign among the warehouse workers and the Respondent suspended/terminated him approximately 1 month after Driscoll found out about the union campaign. The Respondent argues that the following types of misconduct by Mace warranted his suspension/termination: interference with coworkers; failure to perform his own work; dishonesty towards management, including "l[ying] about soliciting and looking for union votes . . . handing out literature in the building"; and, violation of the no solicitation and distribution policy." The alleged misconduct upon which the Respondent relies to justify Mace's termination was all associated with Mace's solicitation and distribution on behalf of the Union.

There are two different analytical frameworks that arguably apply to the question of whether Mace's suspension and termination violated Section 8(a)(3) and (1) of the Act. The first, which the General Counsel argues is applicable, is governed by the Supreme Court's decision in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). The other, which the Respondent argues applies, was set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 US. 393 (1983). I conclude that under either analysis, the result is the same; the Respondent discriminated in violation of Section 8(a)(3) and (1) when it suspended and terminated Mace.

Under the *Burnup* analysis, the General Counsel must establish that the employee was engaged in activity protected by Section 7 of the Act, and that the employer took action against the employee for conduct associated with that protected activity. *Detroit Newspapers*, 342 NLRB 223, 228 (2004). The burden then shifts to the employer to "establish that it had an honest belief that the employee engaged in the conduct for which he was discharged." Id. If the employer meets that burden, "the General Counsel must affirmatively establish that the employee did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge." Id.; *Akal Security*, 354 NLRB No. 11 (2009).

In this case, I conclude that Mace engaged in protected activity by soliciting and distributing literature on behalf of the Union and that the misconduct alleged by the Respondent was all associated with that activity.[31] Prounion solicitation and distribution, even during working time, is protected pursuant to Section 7 of the Act unless it is in violation of the employer's lawful rules. *Wal-Mart Stores, Inc.*, 349 NLRB 1095, 1095 fn. 6 (2007). An employer's limitation on solicitation or distribution during working time is not lawful if the prohibition is enforced disparately or selectively against employees engaged in prounion activity. See *SNE Enterprises*, 347 NLRB 472, 473–474 (2006), enfd. 257 Fed.Appx. 642 (4th Cir. 2007); *Clinton Electronics Corp.*, 332 NLRB 479 (2000), enfd. in part 284 F.3d 731 (7th Cir. 2002).

The Respondent urges me to find that Mace's prounion solicitation and distribution were in violation of lawful rules and therefore unprotected. The evidence is to the contrary. The record shows that nonwork discussions on a variety of topics, and solicitations for causes and products of various kinds, were common at the Respondent's facility, and occurred even during working time and in work areas of the Respondent's facility. Driscoll conceded that, prior to Mace's termination, he had never disciplined, much less terminated, any other employee

[30] The General Counsel does not argue that the interviews relating to Mace's activities constituted coercive interrogations in violation of Sec. 8(a)(1), and the complaint does not explicitly claim that they did. Thus I do not consider that question.

[31] The Respondent concedes that the allegedly improper conduct took place in the context of Mace's organizing work. R. Br. at 42 (describing it as a "fact" that Mace's alleged misconduct "occurred under the guise of union organizing).

for discussing nonwork subjects or soliciting. The record contains no evidence that the Respondent's purported policy on solicitation and distribution existed in writing or was ever announced to employees prior to the union drive. It was not even coherently described by the Respondent's officials. The only time the Respondent was shown to have articulated a restriction on solicitation and distribution to employees was during the antiunion meetings that Donahue conducted in July. Not only does that timing strongly suggest that the rule was motivated by the union campaign,[32] but Donahue expressed the rule in a way which revealed that it was directed at union solicitation. At the meeting for drivers, Donahue announced that *union* activity on company property was a "terminatable" offense. He did not state that the prohibition covered any other types of activities, or state the prohibition in a way that applied generally. At another meeting, this one for warehouse employees, Donahue compared individuals engaged in union solicitation to carpet salesmen, and said that he would not permit the sale of either the Union or carpets on company property. These pronouncements by Donahue did not constitute a lawful prohibition on solicitation and distribution, both because Donahue was singling out union activity, *SNE Enterprises*, supra, *Clinton Electronics*, supra, and because the rule as stated unlawfully extended to union solicitation and distribution activities engaged in by employees on their own time in nonwork areas of the facility, *Republic Aviation Corp. v.* NLRB, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983).

Since the record shows that the misconduct the Respondent alleges Mace engaged in occurred in the course of protected prounion solicitation and distribution, the burden shifts to the employer to "establish that it had an honest belief that the employee engaged in the conduct for which he was discharged." *Detroit Newspapers*, 342 NLRB at 228; *Akal Security*, supra. The Respondent contends that it had a good faith belief that Mace was interfering with the work of others. As evidence, it relies on Driscoll's testimony regarding the complaints he received from, and interviews he conducted with, other individuals working at the facility. For the reasons fully discussed above, I do not credit Driscoll's testimony regarding these complaints and interviews. The only written statements in the record from such individuals do not complain that Mace disrupted their work, but simply report on his facially lawful union activities. Neither statement describes any opprobrious, abusive, or threatening behavior. Cf. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) (employee is not free to carry out union solicitations in an opprobrious or abusive manner). Nor do these statements provide a good-faith basis for believing that Mace was failing to complete his own work.

The Respondent did have a good-faith basis for one of the reasons it forwards for Mace's termination—untruthfulness. However, under the facts presented here, that reason is itself an unlawful one. As discussed above, during an interrogation, Mace untruthfully stated that he did not have anything to do with the Union. This untruth, however, related to Mace's protected union activities, which he was not obligated to disclose. See *St. Louis Car Co.*, 108 NLRB 1523, 1525–1526 (1954). The Board has found that a discharge cannot be lawful when it is based on an employee's failure to fully respond to an unlawful interrogation. See *Hertz Corp.*, 316 NLRB 672, 692 (1995). Thus the fact that the Respondent offered Mace's untruthfulness as a reason for his termination does not show it has a defense, but rather lends support for finding a violation.

Even were I to conclude that the Respondent believed in good faith that Mace engaged in misconduct, I would conclude that the General Counsel has met its responsive burden of establishing that Mace "did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge." *Detroit Newspapers*, supra. For the reasons discussed above, I found that Mace's prounion solicitation and distribution did not disrupt the work of others. Moreover, his conversations with other employees were not heated and he continued to complete his share, and probably more than his share, of assignments during this period. As discussed above, Mace untruthfully denied his union activities when questioned by Driscoll, but Mace was not obligated to disclose those activities to the employer and his untruthful answers cannot be used to justify his termination.

Lastly, even assuming for purposes of argument that Mace engaged in some or all of the misconduct described by the Respondent, I do not believe that, under *Burnup*, the conduct was sufficiently egregious to warrant immediate discharge. Even in Driscoll's hearsay accounts, Mace did not engage in any opprobrious, abusive, or threatening behavior. After the Respondent purportedly received the complaints that Mace's prounion activities were interfering with coworkers, Respondent did not warn Mace or otherwise provide him with an opportunity to cease the conduct before terminating him. Given that the Respondent had previously allowed other types of solicitation and distribution by employees, I see no reason, aside from the union subject matter of Mace's communications, why the Respondent would leap to the drastic step of suspension/termination without advising Mace of the dim view it was taking of such interactions between employees. Indeed, Driscoll himself recalled telling employees Auger and Baker that he would advise Mace to stay away from them while they were working. This suggests that Driscoll himself recognized the appropriateness of such an intermediate step. But he skipped it. Instead, Driscoll proceeded immediately to suspending Mace pending his eventual termination. *Spurlino Materials, LLC*, 353 NLRB No. 125, slip op. at 24 (2009) (fact that severity of discipline is out-of-proportion to offense supports finding of discrimination). For these reasons, I conclude that, under the *Burnup* analytical framework, the Respondent unlawfully suspended and discharged Mace in violation Section of 8(a)(3) and (1).

If one analyzes Mace's suspension and termination using the standards set forth in *Wright Line*, supra, the result is the same—a violation of Section 8(a)(3) and (1). Under the *Wright Line* standards, the General Counsel bears the initial burden of

[32] Timing is an important factor in assessing motivation in cases alleging discriminatory discipline based on union or protected activity, see, e.g., *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2005), enfd. 232 Fed. Appx. 270 (4th Cir. 2007); *Desert Toyota*, 346 NLRB 118, 120 (2005); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), enfd. sub nom.; *Carolina Holdings, Inc. v. NLRB,* 5 Fed. Appx. 236 (4th Cir. 2001); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994).

showing that the Respondent's decision to suspend and terminate Mace was motivated, at least in part, by antiunion considerations. The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *ADB Utility Contractors*, 353 NLRB No. 21, slip op. at 1–2; *Intermet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

In this case, there is no dispute that Mace engaged in extensive prounion activities during the period leading up to his suspension/discharge and the Respondent admits that it was aware of those activities at the time it took action against him. In addition, antiunion animus on the part of the Respondent is demonstrated by the record. During meetings that the Respondent required employees to attend, Donahue (director of operations) warned that union activity at the facility was a "terminatable" offense, and characterized reports that some employees wanted a union as "bad" rumors. As discussed above, the Respondent unlawfully opposed the Union campaign by coercively interrogating employees and creating the impression that union activities were under management's surveillance. This evidence of animus, in particular Donahue's statement that union activity at the facility was a "terminatable offense" is connected to the termination of Mace. Thus the General Counsel has met its initial burden of establishing discriminatory motive.

Since the General Counsel has established discriminatory motive, the burden shifts to the Respondent to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. As discussed above, one of the reasons given by the Respondent—Mace's untruthful denial of his union activity—is itself and unlawful since Mace was privileged under the Act to withhold information about such activity from his employer. See *Hertz Corp.*, supra, and *St. Louis Car Co.*, supra.

Regarding the other reasons forwarded to justify Mace's termination, I conclude that the Respondent has failed to meet its burden of showing that those reasons would have led to Mace's termination in the absence of the Respondent's discriminatory motivation. To the contrary, the evidence showed that Mace continued to complete his own work, did not disrupt others, and did not violate any lawful policy on solicitation and distribution. Moreover, the Respondent has failed to show that it had a good-faith belief to the contrary since Driscoll's testimony about complaints was not credible and the two written employee statements submitted show union activity by Mace, but not disruptive or intimidating conduct. Even were I to conclude that the Respondent believed that Mace's activities on behalf of the union during worktime were interfering with coworkers, or the completion of Mace's own work, I would find that it was the Respondent's animosity towards the union subject matter of those activities, rather than their severity, which led it to terminate Mace without giving him an opportunity to adjust his conduct. See *Spurlino Materials, LLC*, supra (fact that severity of discipline is out-of-proportion to offense supports finding of discrimination).

For the reasons discussed above, I conclude that the Respondent discriminated in violation of Section 8(a)(3) and (1) on July 24, 2008, when it suspended Mace, and on August 4, 2008, when it converted that suspension into a termination, because of Mace's union and concerted activities and in order to discourage such activities

B. Crane's Written Warnings

The complaint alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) on about September 4 and 9, 2008, by issuing warnings to Crane because he and other employees formed, joined, or assisted the Union and engaged in concerted activities and in order to discourage such activities. The Respondent contends that it properly issued the discipline to Crane based on a good-faith belief that he engaged in misconduct.

The General Counsel has made the required initial showing of discriminatory motive under *Wright Line.* There is no dispute that Crane engaged in protected activity. During the antiunion meeting that the Respondent held with drivers on July 11, Crane was one of the few employees to speak. He objected that the drivers were being required to attend this meeting without getting paid for their time. Then, when Donahue asked why employees would want union representation, Crane spoke out—discussing the Respondent's inattention to a safety issue. In addition, Crane supported the union campaign by signing a union authorization card, distributing union cards and literature, talking to people about the Union, and attending a union meeting. Crane was a visible enough supporter of the Union that one antiunion employee, Belanger, repeatedly confronted him on the subject. Immediately after Crane attempted to explain his prounion stance to Belanger, Belanger went to talk with Driscoll. It is clear that the Respondent was aware, at a minimum, of Crane's protected activity at the Respondent's antiunion meeting on July 11. Moreover, I think it is fair to infer that the Respondent knew of at least some of Crane's other protected activities in support of the Union given that the warehouse was a relatively small shop of about 50 employees, and that Driscoll was actively seeking intelligence about the union campaign. "The courts and the Board have long held that an employer's knowledge of union activities by its employees is inferable where these activities are conducted in a small plant, particularly where as here there is evidence of probing by supervisors to obtain information concerning the union activities of employees." *Wells Dairies Cooperative*, 110 NLRB 875, 891 (1954). A union drive concentrated among a group of 50 employees in a larger work force has been viewed as a "small shop" for purposes of this analysis. Id., see also *ADB Utility Contractors*, supra, slip op. at 16 ("small plant" theory "permits the inference of knowledge of union activity from the fact that there are 59 employees in the unit"). That the Respondent bore animus towards the union effort is demonstrated by, inter alia, its discriminatory termination of Mace, unlawful interrogations,

acts creating an impression of surveillance, and Donahue's statement to employees that engaging in union activity at the facility was a "terminatable" offense.

Since the General Counsel has established discriminatory motive, the burden shifts to the Respondent to demonstrate that it would have taken the same action absent Crane's protected conduct. *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Respondent fails to meet this burden because, as discussed fully in the findings of fact above, the record shows that the company rarely if ever disciplined other employees based on conduct comparable to that which it attributes to Crane. See *ADB Utility Contractors*, 353 NLRB No. 21, slip op. at 17 (fact that employer had not disciplined other similarly situated employees for same offense is evidence of pretext) and *Monroe Manufacturing*, 323 NLRB 24, 26–27 (1997) (employer violated Sec. 8(a)(1) when it disciplined an employee who engaged in protected activity based on a rule that was not strictly enforced against other employees). Indeed, Driscoll himself admitted that drivers were rarely disciplined based on store complaints of any kind, and the Respondent offers no lawful explanation for treating Crane differently.

I note, moreover, that the timing of the first warning casts additional doubt on the legitimacy of the Respondent's claim that it would have taken the same action in the absence of union activity. That warning was based on a store complaint received by the Respondent on July 30 about a breach of security policy. However, the warning was not presented to Crane until 6 weeks *after* the Respondent received that complaint. The Respondent provides no explanation for the time lag, or for its decision to revive the complaint, and punish Crane, so long after the alleged misconduct. The absence of such an explanation, along with the evidence of antiunion motivation, suggests that the Respondent's reliance on the stale store complaint was pretextual.

For the reasons discussed above, I conclude that the Respondent has failed to meet its burden of showing that it would have issued any of the warnings to Crane absent the antiunion motivation. Indeed, I believe that examination of the Respondent's treatment of Crane—i.e., issuing three warnings to him in a few days time based on conduct for which other drivers were rarely if ever disciplined—is further evidence of unlawful motive. See *ADB Utility Contractors*, supra.

I conclude that the Respondent discriminated in violation of Section 8(a)(3) and (1) in September 2008 by issuing warnings to Crane because of his union and concerted protected activities, and in order to discourage such activities.

C. Discharge of Adorno, Beattie, and Glover

The complaint alleges that the Respondent discriminated on the basis of union activity when it implemented the requirement that each of its drivers have a Class A CDL and thereby caused the terminations of drivers Adorno, Beattie, and Glover.[33] In its brief, the General Counsel argues that the Class A CDL requirement was imposed to eliminate Beattie, and that Adorno and Glover were "swept up in [the] negative employment action as cover for the discriminatorily motivated act."

The General Counsel has met its initial burden under *Wright Line*. The evidence establishes that the Respondent had knowledge of Beattie's union activism. In July, during the Respondent's antiunion meeting for drivers, Beattie openly acknowledged that he was engaged in union activities and expressed the view that those activities had led the Respondent to retaliate against him by increasing his workload. Moreover, given that there were only approximately 50 to 55 drivers and that Beattie had distributed union cards to between 40 and 45 of them, it is appropriate under the "small facility" theory to infer that the Respondent had knowledge of Beattie's role in the union campaign. See *ADB Utility Contractors*, 353 NLRB No. 21, slip op at 16; *Wells Dairies Cooperative*, 110 NLRB 875, 891 (1954). This inference is especially apt given that Driscoll not only actively probed employees about the union campaign, but had specifically interrogated an employee about Beattie's conversations with other drivers. *Wells Dairies Cooperative*, supra. The Respondent's antiunion animus is demonstrated by, inter alia, its: discriminatory discharge of Mace (the other leading union advocate among its employees); discriminatory discipline of Crane; unlawful interrogation of employees; acts creating the impression of surveillance; and Donahue's statement to employees that union activity at the facility was a "terminatable" offense.

The evidence shows that Adorno and Glover were discharged based on the same new licensing requirement with respect to which I find that the General Counsel has met its initial burden. The Board has held that the layoff of an employee who is not the target of an employer's antiunion motivation is still unlawful where that employee was laid off to mask the antiunion motivation of actions against the employer's real target. *Pillsbury Chemical Co.*, 317 NLRB 261 (1995). Antiunion motivation may be found even when some, or even most, of the affected employees were not known union supporters. See, e.g., *McGaw of Puerto Rico, Inc.*, 322 NLRB 438, 451 (1996), enfd. 135 F.3d 1 (1st Cir. 1997). The requisite antiunion animus exists where the evidence shows that the aim of the action was "to discourage union activity or to retaliate against employees because of the union activities of some," despite evidence that "employees who might have been neutral or even opposed to the Union are laid off with their counterparts," Id. See also *Weldun International*, 321 NLRB 733, 734 and 748 (1996) (violation where the employer did not select employees for layoff based on their support for the Union, but the layoff was part of an effort to discourage employees from supporting the Union), enfd. in part 165 F.3d 28 (6th Cir. 1998) (table); *Davis Supermarkets*, 306 NLRB 426 (1992) (same), affd. and remanded 2 F.3d 1162, 1168–1169 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994); *Mini-Togs, Inc.*, 304 NLRB 644, 648 (1991) (same), enfd. in part 980 F.2d 1027 (5th Cir. 1993); *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987) (same); *ACTIV Industries*, 277 NLRB 356, 356 fn. 3 (1985) (same). On this basis, I find that the General Counsel has met

[33] The General Counsel argues in the alternative that these individuals were constructively discharged and that they were discharged. In its brief, the Respondent admits that it terminated the employment of Adorno, Beattie, and Glover on September 15, 2008. R. Br. at p. 6, Par. 24. That admission moots the question of whether the standards for constructive discharge were met.

its initial burden with respect to the discharges of Adorno and Glover pursuant to the newly adopted licensing requirement.

The burden now falls to the Respondent to show that it would have enacted the new licensing requirement and terminated the three drivers as it did even absent the union activity. Although the question is a close one, I find that the Respondent has failed to meet that burden. The Respondent did present convincing evidence that it had good reason for wanting to phase out the use of the smaller straight trucks in favor of the larger tractor trailer trucks—a change that meant that most or all of its drivers would need Class A licenses. However, the Respondent has failed to demonstrate by a preponderance of the evidence that it would have implemented the new requirement *when* it did and *how* it did if not for its antiunion animus. As the Board has held, in order to meet its responsive burden under *Wright Line* an employer must demonstrate by a preponderance of the evidence "that it would have done *what* it did, *when* it did, in the absence of the drivers' union activities." *We Can, Inc.,* 315 NLRB 170, 172 (1994) (emphasis added); cf. *Lear-Siegler, Inc.*, 295 NLRB 857, 859 (1989) (economic reasons cannot justify relocation where such economic reasons existed months before employees sought union representation, and relocation followed immediately thereafter). It is not enough to show that it could have taken the action it did for the reasons given, rather must show that it would have taken the action for the reasons given. *Structural Composites Industries*, 304 NLRB 729, 729–730 (1991); see also; *Weldun International*, 321 NLRB at 747 ("The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence") (internal quotation omitted).

Regarding *when* the Respondent implemented the new requirement, the evidence showed that the Respondent issued the memorandum setting forth the new requirement *on the same day as* the Respondent held the July 11 antiunion meeting during which Donahue warned drivers that union activity at the facility was a "terminatable" offense. Driscoll posted the memorandum the next day. At the July 11 meeting, Beattie openly acknowledged his union activity and, as that meeting was ending, Driscoll pulled Beattie aside and orally notified him about the new requirement and the September 15 deadline. This timing is extremely suspicious, see supra footnote 32, and leaves the Respondent with a great deal of explaining to do regarding the precise timing of its action. Its witnesses did not rise to the challenge. Donahue, the official who testified about the process by which the new requirement was adopted offered no explanation for the precise timing of the rule's promulgation. Asked when the Respondent made the decision to impose the new licensing requirement, Donahue's answer was decidedly vague—"back in May–April, May, June in that area." He did not explain why, if the decision was made as early as April, it was not announced to affected employees until July 11—the same day that the Respondent inaugurated its antiunion campaign among the drivers. Furthermore, the Respondent produced no written record of meetings or proposals, or other documentation, showing how the decision was made or demonstrating that the decisional process naturally culminated on July 11 for reasons unrelated to the union campaign or Beattie's public acknowledgment of his involvement in that campaign. Cf. *Weldun International*, 321 NLRB at 734 (layoff found unlawful where employer failed to produce "any documentation or credited testimony" indicating that a layoff was planned prior to the filing of the representation petition). I note, moreover, that the major changes in delivery responsibilities (the addition of coffee and high volume items) that the Respondent relies on to explain the timing of its decision had largely been implemented several months earlier in March and April. Those changes do not explain the timing of the new requirement since they were made months before the employees began their union campaign while the issuance of the new rule followed shortly after that campaign was initiated. See *Lear-Siegler, Inc.,* supra.

Not only has the Respondent failed to show by a preponderance of the evidence that it would have implemented the requirement *when* it did absent the union activity, it has failed to show that it would have implemented the requirement *how* it did absent that activity. The "how" to which I am referring is under an extremely short deadline that was almost certain to result in the elimination of Beattie from his position as a driver. The July 11 announcement of the September 15 deadline left the three alleged discriminatees with just a little over 2 months to pass the written test and background check needed for a training permit, complete driver training that typically took 120 to 160 hours, and then schedule and pass the test—all while continuing to work full time. The Respondent attempted to show that this deadline was workable by presenting the testimony of Marques, a driver who upgraded from a Class B to a Class A license while working for the Respondent full time. However, even Marques did not succeed in upgrading within 2 months. The evidence showed that Marques already had his Class A permit in April and began training, but did not obtain his Class A license until July—over 2 months later. The task for Beattie, Adorno, and Glover was even more daunting than for Marques, since they did not have Class A permits on July 11 when the Respondent initiated the countdown to the September 15 deadline. The Respondent has not explained how the September 15 deadline was arrived at, or why it did not choose to allow Beattie, Adorno, and Glover more time, or an extension of time, in which to meet the new requirement. The Respondent has not tied the specific September 15 date to any occurrence unrelated to the union campaign. This gap in the Respondent's nondiscriminatory explanation for its decision is widened by Donahue's testimony that the decision was made as early as April, meaning that the Respondent might have been able to give the drivers as much as 5 months to meet to the September 15 deadline, rather than springing that deadline under circumstances that meant the drivers would almost certainly fail to meet it.

For the reasons discussed above, I conclude that the Respondent has failed to meet its burden of showing that it would have taken the same action it did, when it did, in the absence of antiunion motivation.

I conclude that the Respondent discriminated in violation of Section 8(a)(3) and (1) by imposing the new licensing requirement and discharging Adorno, Beattie, and Glover.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent interfered with employees' exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act: in July 2008, when Driscoll coercively interrogated Glover about Beattie's conversations with other drivers; on July 24, 2008, and again approximately one week later, when Driscoll coercively interrogated Mace; in July 2008 by creating the impression that it had placed the employees' union activities under surveillance.

4. The Respondent violated Section 8(a)(3) and (1) of the Act: on July 24, 2008, when it suspended Mace, and on August 4, 2008, when it converted that suspension into a termination, because of Mace's union and concerted activities and in order to discourage such activities; in September 2008, by issuing warnings to Crane because of his union and concerted protected activities, and in order to discourage such activities; when it imposed the new licensing requirement and discharged Adorno, Beattie, and Glover on September 15, 2008, because of employees' union and concerted activities and in order to discourage such activities.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be required to offer Adorno, Beattie, Glover, and Mace reinstatement and make them whole for any loss of earnings and other benefits they suffered as a result of the discrimination against them, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel urges that the Board's "current practice of awarding only simple interest on backpay and other monetary awards be replaced with the practice of compounding interest." Brief of General Counsel at 64. The Board has considered, and rejected, this argument for a change in its practice. *Cadence Innovation, LLC*, 353 NLRB No. 77, slip op. at 1 fn. 1 (2009); *Rogers Corp.*, 344 NLRB 504 (2005). If the General Counsel's argument in favor of compounding interest has merits, those merits are for the Board to consider, not me. I am bound to follow Board precedent on the subject. See *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order[34]

ORDER

The Respondent, DPI New England, Canton, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about activities protected by Section 7 of the Act.

(b) Creating the impression that it has placed employees' union activities under surveillance.

(c) Discharging or suspending any employee for supporting the International Brotherhood of Teamsters, Local 25 or any other union.

(d) Issuing a written warning to, or otherwise disciplining, any employee for supporting the International Brotherhood of Teamsters, Local 25 or any other union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace, and within 3 days thereafter notify them in writing that this has been done and that the discipline would not be used against them in any way.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension or Derek Mace, and within 3 days thereafter notify him in writing that this has been done and that the discipline would not be used against him in any way.

(e) Rescind and revoke the written warnings issued to Frederick "Rick" Crane in September 2008.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful written warnings issued to Frederick "Rick" Crane, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Canton, Massachusetts, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2008.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 29, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT create the impression that we have placed your union activities under surveillance.

WE WILL NOT discharge, suspend, or otherwise discipline against any of you for supporting International Brotherhood of Teamsters, Local 25, or any other union.

WE WILL NOT issue warnings or other discipline to you for supporting International Brotherhood of Teamsters, Local 25, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension of Derek Mace, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL, within 14 days from the date of this Order, rescind and revoke the unlawful written warnings issued to Frederick "Rick" Crane.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful written warnings issued to Frederick "Rick" Crane, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warnings will not be used against him in any way

DPI NEW ENGLAND

Elizabeth Tafe, Esq. and *Emily Goldman, Esq.,* for the General Counsel.

Arthur M. Brewer, Esq. and *Kraig B. Long, Esq. (Shaw and Rosenthall, LLP),* of Baltimore, Maryland, for the Respondent.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Boston, Massachusetts, on February 9, 10, and 11, 2009. The allegations concern the actions of DPI New England (the Respondent) during a union organizing campaign that began among its employees in June 2008. The International Brotherhood of Teamsters Local 25 (the Union) filed the initial charge on July 25, 2008, and an amended charge on December 16, 2008. The Director of Region One of the National Labor Relations Board (the Board) issued the complaint on December 31, 2008.[1] The complaint alleges that the Respondent violated

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are in 2008, unless otherwise indicated.

Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating employees about union activities, and creating the impression that the employees' union activities were under surveillance. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) by discriminating based on employees' union and other protected concerted activities when it: suspended and terminated employee Derek Mace; issued disciplinary warnings to employee Frederick "Rick" Crane; and imposed a new eligibility requirement that resulted in the constructive discharge, or discharge, of three drivers (Alexander Adorno, Roger Beattie, and Anthony Glover). The Respondent filed a timely answer in which it denied that it had committed any of the unfair labor practices alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Canton, Massachusetts, distributes goods to stores that Starbucks Corporation owns and operates throughout New England. In conducting this business, the Respondent annually purchases and receives at its Canton facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts, and annually provides services valued in excess of $50,000 to Starbucks Corporation, an entity engaged in interstate commerce in states other than the Commonwealth of Massachusetts. The Respondent admits, and I find, that it is employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Background Facts

The Respondent is a distribution and supply company that delivers products to 325 Starbucks stores and licensed Starbucks venders (collectively referred to as Starbucks stores or stores) in Connecticut, New Hampshire, Maine, Massachusetts, New York, Rhode Island, and Vermont.[2] In addition, the Respondent delivers Starbucks products to a number of distribution centers operated by other companies. The Respondent has a facility in Canton Massachusetts, where products are received, stored, and loaded for delivery. Its corporate offices are located in Maryland. The Respondent uses trucks to make its deliveries and also to pick up some of the product that it delivers. Much of the product that the Respondent transports is Starbuck's own inventory and the Respondent is only responsible for receiving that product at the Canton facility and delivering it to Starbucks stores and distribution centers. Other categories of product are owned by the Respondent and purchased from it by Starbucks. As of the time of the trial, the Respondent employed 50 truckdrivers[3] and 47 warehouse workers. The Respondent's truckdrivers and warehouse workers are supervised, respectively, by transportation supervisors and warehouse supervisors. During the time period covered by the complaint the Respondent also had a transportation manager, Dave Robitaille. The supervisory personnel report to Frank Driscoll, the Respondent's operations manager. Driscoll, in turn reports to Mark Donahue, who is the Respondent's director of operations. Driscoll has been operations manager since July 2007. Donahue has been the director of operations since some time in 2007, and before that he was the Respondent's operations manager.

The delivery services that the Respondent provides to Starbucks expanded significantly in recent years. The Respondent began its operations in approximately 2005 and until March 2008, the types of products it delivered were limited to paper products (such as, cups, lids, napkins, paper towels), dairy items, juices, water, pastries, and sandwiches. Starting in March 2008, the Respondent added two broad categories of product known as "high volume" items[4] and "cross dock coffee." High volume items include those things that the Starbucks stores use in large quantities on a daily basis. The "cross dock coffee" category includes not only coffee, but also coffee mugs, coffee makers, musical recordings, signs, display tables, and other miscellaneous items seen in Starbucks stores.

In an effort to prepare for the increased workload, the Respondent added 8t to 10 trailers to its truck fleet and hired additional drivers. On March 1, 2008, the Respondent split most of its routes in order to reduce the number of stores covered by each route and help accommodate the larger deliveries it was making to individual stores.[5] Nevertheless, between March and May 2008, truckdrivers began to notice very substantial increases in the total cargo they were carrying on their trucks.

In August 2008, the Respondent began selling Starbucks the paper products that it delivered to the stores. Prior to that time, the Respondent received pre-assembled pallets of Starbucks-owned paper products and then delivered those pallets to individual stores on a weekly basis. After the Respondent began to sell the paper products to Starbucks, it began making such deliveries to individual stores on a daily, rather than a weekly, basis. It appears that the August 2008 changes in the Respondent's role with respect to paper products increased to some extent the size of the loads the Respondent was carrying on its trucks.

[2] The Respondent's only client is Starbucks, but it is associated with a larger corporate entity that has clients besides Starbucks. Starbucks does not own the Respondent.

[3] This total is down slightly from July 2008, when the Respondent employed approximately 55 drivers.

[4] The high volume items are often referred to in the record as "SKUs."

[5] Generally a driver is assigned to the same route for an extended period of time. Each night-shift route is serviced 7 days a week. One night-shift driver completes the route 4 days a week, and another night-shift driver completes the same route 3 days a week. The driver who delivers the route 3 days a week will work one additional night shift as a "floater" who can perform a variety of driving and other tasks. On average there are 3 floaters on a night shift. The drivers who service the day routes do not switch off with another driver in this manner.

As a result of the increase in the amount of product being delivered, the Respondent found that, by April 2008, it was sometimes unable to fit the cargo for a route onto one of its smaller, "straight truck" vehicles and was forced to remove that product and reload it onto a larger tractor-trailer truck. In some instances this meant that the driver who usually made the deliveries, and therefore was familiar with the route, had to ride together with a driver who was qualified to operate the larger tractor-trailer truck. In such instances, the Respondent paid two drivers to complete a route that was usually completed by a single driver. The larger loads also increased the extent to which cargo had to be "stacked" in order to fit on the straight trucks, and this meant that the product was damaged more frequently. The Respondent's tractor-trailer trucks were large enough to accommodate product without this increased stacking. In its brief the General Counsel concedes that, as a result of the larger size of the loads, the "Respondent apparently experienced limitations on its ability to effectively utilize the straight trucks." Brief of General Counsel at 9.

The stacking of product on the straight trucks also made it more difficult and time consuming for drivers to load and unload those trucks. This was a serious concern to the drivers because they are paid by the "trip"—meaning that they receive a fixed amount of compensation for completing a route, regardless of how long that takes. Thus the drivers do not receive any additional compensation even if an increase in load size means they have to work longer shifts. The Respondent expects that it will take a driver 10 hours to complete the day's route and associated tasks. However, some drivers found that with the increased size of the loads the "trips" were consistently taking more than 10 hours to complete. This appears to have been one of the concerns that led drivers to initiate the union campaign.

B. Union Campaign

During the second week of June 2008, employee Roger Beattie, who operated one of the Respondent's straight trucks, contacted the Union about representing employees at the Respondent's facility. Shortly thereafter, the Union supplied Beattie with union authorization cards and prounion literature. Beattie distributed between 40 and 45 authorization cards, and prounion literature, to truckdrivers employed by the Respondent. He also organized meetings between truckdrivers and union officials. Union officials held three meetings with drivers over the course of 2 weeks during the first part of July. The initial two meetings were both held at the headquarters of the union local and attracted between two and four drivers each. The third meeting was held at a donut store in Canton and was attended by between 15 and 20 drivers.

Another straight truckdriver, Frederick "Rick" Crane, supported the organizing campaign by passing out 20 union cards to drivers, distributing prounion literature to approximately eight drivers, talking to people about the Union, signing a union card himself, and attending a union meeting. The record does not reveal precisely when Crane engaged in most of these activities. However, it does show that the union meetings Crane and other drivers attended took place in the first part of July, and that Crane had distributed union literature by September 14 at the latest.

During roughly the same time period when Beattie and Crane were working to generate support for the Union among drivers, Derek Mace, a warehouse employee, was leading an effort to generate support among the Respondent's warehouse workers. Mace obtained union authorization cards from Beattie, and distributed 20 or more such cards to warehouse employees. In June and July, Mace had conversations about the Union with other employees on a daily basis, and eventually raised the subject with almost every one of the Respondent's approximately 47 to 50 warehouse employees. In some instances Mace initiated these conversations, and in others the employees did so. None of Mace's conversations about the Union were heated and none of the employees told him not to talk to them about the Union. In some instances, Mace's conversations with employees took place while the other employee was working. However, the record shows that employees could perform warehouse work while they were talking about nonwork related matters, and Mace credibly testified that his conversations with employees did not disrupt their work. Indeed it is undisputed that warehouse employees routinely talk about a variety of other subjects while working—including sports and after-work activities—without interference from the Respondent. On July 17 2008, there was a union meeting for the warehouse employees at a restaurant in Canton, Massachusetts. This meeting was attended by officials of the Union and a group of about 10 warehouse employees. Mace discussed his concerns about workplace safety with an official of the Union. The union official suggested that Mace report his concerns to the Occupational Safety and Health Administration (OSHA), and Mace did so in June or July. Shortly thereafter, OSHA investigators visited the Respondent's facility to perform an inspection. The record does not disclose the exact date of that inspection, but it is clear that it occurred sometime before July 28.[6]

Mace's efforts on behalf of the Union did not prevent him from performing his job duties, which consisted mainly of "picking" milk products that were designated for particular orders and organizing those products onto pallets that would then be loaded onto trucks for delivery to stores. On a typical day during the summer of 2008 there were approximately 24 such orders, and between three and four people picking the orders. Mace usually picked between 8 and 10 orders. He also helped to load trucks.[7]

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[6] A letter sent to the Union by the Respondent's counsel states that the inspection occurred on July 25, GC Exh. 21, but there was no sworn testimony to that effect and no OSHA notice or other documentary evidence confirming the date. In its brief, the Respondent states that it had no knowledge of Mace's involvement in the OSHA inspection at the time it suspended him. R. Br. at 29, Par. 170. Before the suspension was converted to a discharge, however, the Union circulated a flyer concerning Mace's OSHA complaint to the Respondent and others.

[7] Driscoll testified that he received reports from employees and supervisors that Mace was not performing his job duties and was interfering with other employees' work. However, the Respondent failed to call any of those employees or supervisors to testify about what they had witnessed. Mace, on the other hand, appeared as a witness and testified that while talking about the Union he continued to complete his work and did not interrupt the work of others. Although Mace was

Approximately 25 to 30 of the Respondent's approximately 50 to 55 truckdrivers signed authorization cards and returned them to Beattie. The record does not reveal how many of the approximately 47 warehouse employees signed union cards. Among the issues that drivers were concerned about were the replacement of trip pay with hourly pay and the institution of new retirement benefits. Not all employees welcomed the union effort. In late June 2008, Ron Belanger,[8] after speaking to one of the Respondent's warehouse supervisors (Barry Lopes), approached Beattie and complained that the union supporters were "screwing everybody over." Subsequently, on occasions in July and August, Belanger made further comments in the same vein to Beattie. In August, Belanger approached another union supporter, Crane, and said: "Hey pussy boy. The Union is not getting in. You used my name." Subsequently, Crane attempted to explain his position regarding the Union to Belanger. Belanger did not respond to Crane, but rather walked away and went to talk to the Respondent's operations manager, Driscoll.

C. Management Meets with Employees

By late June, Driscoll had heard about the existence of the union effort at the facility. In response to the organizing effort, the Respondent required employees to attend meetings at which Donahue, the Respondent's director of operations, delivered remarks opposing unionization. Drivers were required to attend such a meeting in the facility's breakroom on July 11. In addition to Donahue, there were two warehouse supervisors—Rod Grippen and Lopes—present for management. Donahue stated that he had "heard bad rumors" that "a lot of people wanted the union in." He warned the drivers that "there should be no union activity on the property," and that such activity was a "terminatable [sic] offense." Donahue also stated that he was disappointed by the union activity since the Respondent had always had "an open door policy." He invited the drivers to discuss their grievances. A number of drivers spoke. Beattie, publicly complained that there had recently been a dramatic increase in the workload on his route. He expressed the view that the Respondent had increased his workload in retaliation for his efforts on behalf of the Union.[9] Crane also spoke at the meeting. He complained that the Respondent was not paying employees for attending the mandatory meeting. When Donahue asked why employees wanted union representation, Crane answered by describing a safety problem and complained that even after that problem had caused an injury, the Respondent neglected to repair it. Either at, or immediately following, this meeting, Driscoll told Beattie and two other drivers who were not qualified to drive tractor-trailer trucks, that they should begin the process for upgrading their commercial drivers' licenses.

In July, the Respondent also held a meeting in the breakroom to discuss the union campaign with warehouse employees. Present at the meeting from management were Donahue, Driscoll, and a warehouse supervisor named Barry Baldack.[10] Donahue informed the employees that there was "talk of . . . a union going around the warehouse." He told them, "You don't need this, we don't need a third party, you know, we're like family." Donahue reminded them that in the past he had provided jobs to immediate family members of incumbent employees. He said he wanted to know "if anyone has information on what" is "going on." Donahue also warned that he was "not going to let anybody to solicit on company property." He said "I'm not going allow somebody to come here and sell you guys carpets, so I'm not going to let somebody come in and sell union to you guys either."

Prior to the union campaign, the Respondent had never told Crane that employees could not discuss any nonwork topic while working, much less said that such discussions were a "terminatable offense." Moreover, the Union was the only topic that Crane ever heard the Respondent's officials declare off limits for work-time discussions. Similarly, prior to the union campaign, the Respondent had never told Mace that employees were not permitted to solicit during work. The record does not include any written company policy against solicitation and distribution and the Respondent has not asserted that such a written policy existed. Indeed, the record shows that it was common for employees to distribute sales catalogues, ask coworkers to purchase items, and make fund raising solicitations both in the breakroom and in work areas of the facility. Such solicitations sometimes occurred while the employees were working.

Also in July, Driscoll questioned a driver named Anthony Glover about conversations that Beattie had been having on the dock with other employees. Glover and Beattie were friends, and Glover was aware of the union campaign in early July and signed a union authorization card. Driscoll called Glover by phone while Glover was driving his truck to make deliveries. He asked whether Glover could tell him what "Beattie is talking to all the drivers for?" Driscoll cautioned Glover to be "real frank . . . real serious." Glover responded that he did not

an ardent union supporter, and has a personal stake in the outcome of this proceeding, I found him generally credible based on his demeanor and the record as a whole. With respect to the question of whether Mace actually failed to meet his responsibilities as an employee and interfered with the work of other employees, Driscoll's testimony is hearsay and, given the record here, is outweighed by Mace's credible contrary account. The reliability of Mace's testimony on this subject was enhanced by the level of detail he provided. Mace specified how many milk orders were typically completed during his shift (24), how many employees those orders were divided among (3 to 4), and how many of the orders he himself was completing per shift (8 to 10). Driscoll, on the other hand, gave only general testimony about reports that Mace was leaving his work area and not completing his work. Driscoll did not state how many milk orders Mace was expected to complete or how many he was completing. Nor did Driscoll contradict Mace's testimony regarding those numbers.

[8] This individual's name also sometimes appears in the transcript spelled "B*a*langer."

[9] Beattie did not address this remark directly to Donahue, but to another employee. However, the testimony leads me to find that Beattie made the remark as part of the public back-and-forth at the meeting. See Tr. at 70 to 71.

[10] This individual's name also sometimes appears in the transcript spelled "Bald*e*ck."

know what Driscoll was talking to employees about. It was unusual for Driscoll to contact Glover while he was driving his route. Generally Driscoll only did so if there was something he needed to communicate regarding the deliveries.

D. Mace Terminated

The Respondent discharged Mace—the lead union organizer among the warehouse workers—on August 4, after suspending him on July 24. Mace had been working for the Respondent since February 2006. Driscoll informed Mace of the suspension at a July 24 meeting held in Donahue's office. Warehouse Supervisor Baldack was also present. Driscoll stated that he knew Mace was responsible for the union organizing and said that other employees felt "threatened" by him and were "scared" that they were "going to lose their jobs." Mace was not provided with any disciplinary paperwork at this meeting, but Driscoll stated that he was being suspended until further notice because he was not working, was interfering with other employees, and was soliciting on company time and where other people were working. At the meeting, Mace responded: "I haven't done anything wrong, . . . I haven't broken any laws and I don't understand why I'm being suspended. I do my work all the time." Mace also told Driscoll that he had "nothing to do with the Union." During the period leading up to the July 24 suspension, no supervisor had told Mace that he was not getting his work done.

In a subsequent letter dated July 28, Driscoll stated that Mace was suspended "pending further investigation into complaints made by employees" that he was "interfering with their work." The letter informed Mace that "it may be necessary to take further disciplinary action up to and including dismissal, if the investigation concludes that you violated the company's solicitation and distribution policy." The letter makes no mention of Mace failing to perform his own duties. The next week, Driscoll and Baldack met with Mace a second time. Driscoll testified that he told Mace: "[Y]ou lied. You lied to me about where you were, you lied to me about soliciting and looking for Union votes . . . in the warehouse, handing out literature in the building."

After the second meeting with Driscoll and Baldack, Mace received a letter, signed by Driscoll and dated August 4, 2008, which stated that Mace's employment with the Respondent was terminated effective that day. The letter set forth the bases for termination as follows:

- Interfering with your co-workers' jobs
- Not doing your work
- Dishonesty towards Management
- Violation of the No Solicitation and Distribution Policy.

In addition, the letter stated that:

> During the course of the investigation you categorically denied interfering with your co-workers performance of their jobs. We have information from several sources w[hich] substantiate you did, in fact, interfere with your co-workers while they were working. In short, you lied to management.

Prior to the suspension, Mace had never received any warnings or other discipline for interfering with coworkers' performance of their job duties, failing to perform his own work, dishonesty towards management, or violation of any policy on solicitation or distribution.[11] At trial, Driscoll testified that he "might have" told an agent of the Board that by "dishonesty to management," he meant that Mace had denied involvement with the Union. As discussed above, during the second meeting regarding Mace's discipline, Driscoll told Mace, "[Y]ou lied to me about soliciting and looking for Union votes . . . in the warehouse, handing out literature in the building."

At trial, Driscoll was the only witness who testified for the Respondent about the shortcomings upon which Mace's suspension and termination were purportedly based. Driscoll could recount just one specific incident that he personally witnessed. Driscoll testified that in late June or July 2008, he witnessed Mace giving Beattie a ride along the Respondent's dock on an unloaded pallet jack.[12] Then Mace and Beattie went into Beattie's trailer and remained there for approximately 20 minutes. Driscoll testified that he eventually told Mace to return to work and that Mace said he had been helping Beattie. Driscoll states that, on the same day, many employees were straying from their normal work patterns and that he counseled at least one other driver—this one not an alleged discriminate—for failing to load his truck in a diligent manner. Driscoll also stated that drivers were going "truck-to-truck" that day, something that he described as unusual.[13]

Driscoll testified that in addition to the one incident regarding Mace that he witnessed, he received multiple reports that Mace was not doing his job or was interfering with others. More specifically, Driscoll stated that over a 10-day period in late July 2008, he had received complaints about Mace from employees Scott Auger, Harold Baker, Mark Cinelli, Tony Mederios, and Tom Taft, and from Supervisor Roy Blakely.[14] As alluded to above, not one of the seven individuals named by Driscoll were called by the Respondent to testify about Mace's alleged infractions or about their conversations about Mace with Driscoll. Instead the Respondent relied on Driscoll's account of what they told him.

Driscoll stated that, Auger, a warehouse worker, complained that Mace was coming to the high volume section of the warehouse a couple of times a day, talking to employees, and that "they're not getting the product out fast enough." Driscoll testified that he told Auger that he would "talk to Derek [Mace]

[11] There was evidence that Mace had had attendance problems in the past. The Respondent concedes that those prior attendance problems had nothing to do with Mace's suspension and termination.

[12] A pallet jack is a type of warehouse equipment used to lift and move product.

[13] Driscoll also testified that on one occasion he observed Mace near the sandwich line. Driscoll stated that Mace would have no work-related reason for being there unless he was loading trucks, and that on the day in question Mace was "doing milk." When pressed on cross-examination, however, Driscoll stated that Mace loads trucks on days when he is "doing milk."

[14] According to Driscoll, Blakely was a nonsupervisor when he made an earlier complaint about Mace, but was promoted before making his second, late July complaint.

and tell him to stay out of there." Driscoll testified that Baker, a truckdriver said: "Dude, what's going on? I . . . got this guy from the warehouse that delivers milk in my truck, I'm trying to unload and . . . all he's doing is talking to me about Union. I kept saying 'Look, will you let me unload?'" According to Driscoll, Baker asked "Can you do anything about it?," and Driscoll responded: "I'll talk to him about staying off of the trucks. He can't stop you from working." Driscoll testified that Cinelli reported that Mace had started talking to him about the Union while in the breakroom and that Cinelli said he did not want to be involved and told Mace to "watch whas he was doing." According to Driscoll, Cinelli said that Mace continued the conversation and made Cinelli uncomfortable. Driscoll stated that he told Cinelli that Mace could talk to him during a break, but that Mace was "not supposed to be on break."

In addition, Driscoll testified that Mederios, a warehouse employee, approached him to talk about Mace in late June or early July 2008. In Driscoll's account, Mederios said: "I was trying to go to work, I was trying to get into the freezer and Derek [Mace] stopped me, he was talking to me about joining the Union. . . . I went to go into the battery room, he followed me in there." Driscoll testified that he asked if Mederios wanted to file a complaint about Mace, but Mederios did not choose to do so. Driscoll stated that he told Mederios that Mace "shouldn't be doing this while you're trying to work." Driscoll testified that Taft, a warehouse employee who unloaded trucks, complained that he was working when Mace approached him about the Union. Driscoll testified that Taft reported that he told Mace he was not interested in joining a Union, but that Mace subsequently approached him again while he was working. Driscoll said he asked Taft "Are you feeling threatened or is he stopping you from working?" and that Taft responded, "Well, every time I'm trying to work he's trying to talk to me about the Union, all I want to do is work."

Driscoll also testified that he had two conversations about Mace with Blakely—the first one when Blakely was a warehouse employee and the second after Blakely was promoted to a supervisory position. Driscoll stated that, on the first occasion, Blakely said that Mace had talked to him in the parking lot about the Union. Driscoll stated that, on the second occasion, Blakely reported that he was working when Mace said he had seen union officials the night before and that "management's screwed." According to Driscoll, Blakely reported that he responded to Mace by saying, "You know I'm a supervisor," and that Mace said he "d[id]n't care." Driscoll recounted that he told Blakely there was not much he could do unless Blakely made a formal complaint.

At trial, the Respondent submitted written statements from two of the individuals who Driscoll said complained about Mace. These statements—one from Taft and one from Blakely—are undated and both discuss Mace's union activity. The statement from Taft says that over the course of a "couple of days," Mace approached him to talk about the Union. At least one time this happened while Taft was picking product to fill an order. Taft states that he "just i[g]nored" Mace. In his written statement, Taft also informs on another employee who he said accepted a "paper for the Union." Taft's written statement does not claim that Mace interfered with work, that Mace himself was failing to complete his work, or that Taft found Mace threatening in any way. The statement from Blakely describes two occasions when Mace approached him about the Union. Blakely opposed the Union, and he recounted telling Mace why he would not support it. According to Blakely's statement, the first discussion occurred in the Respondent's parking lot and concluded when Blakely ended it. The second discussion took place inside the warehouse. The statement says that Mace said "the Union took him to dinner and that management will be screwed." According to Blakely, he responded that Mace was "full of shit." Blakely's statement says that when he told Mace that he "did not want to hear anymore," the discussion ended. The statement makes no mention of whether Mace and Blakely were on break during the second discussion or whether they were engaging in work activities while they talked. Blakely's written statement does not claim that Mace interfered with his ability to carry out work duties or that Mace was failing to complete his own work. Nor does Blakely state that he believed Mace was threatening him.[15]

Driscoll testified that, after suspending Mace, the Respondent investigated Mace's conduct by interviewing between eight and nine individuals. Once again, the Respondent did not present the testimony of a single one of those individuals, but rather relied on Driscoll's account of what they reported to him. Moreover, Driscoll stated that he did not memorialize any of his many interviews in writing or make a written report regarding the evidence collected in the investigation. Considering his failure to make any record of his investigation, Driscoll's testimony about what each employee supposedly told him was surprisingly specific. Driscoll testified that he talked to Baldack, a supervisor who reported that Mace "was in the pastry room, like four [or] five times I had to get him out [of] there today." Driscoll described a meeting with Dominic Statkus, who he described as a lead milk loader. Driscoll testified that, according to Statkus: "[Mace is] always trying to organize something, he's not where he's supposed to be. I got to go looking for him. A lot of times he's on the trucks just talking to the drivers. . . . Derek's holding . . . court in the pastry room a lot." Driscoll testified that he interviewed Marguerite McClellan, the lead person for picking pastries from the warehouse to fill orders. He asked McClellan what Mace had been doing and whether Mace had been causing problems for her. According to Driscoll, McClellan replied, "Yeah, [Mace is] always over here . . . slowing down the line or having meetings in the pastry room," and that "everybody was saying he was talking union." Driscoll also testified that he talked to Scott LaPlante, who assembled orders of high volume products. Driscoll told LaPlante that he had been receiving a lot of complaints about Mace and asked him "is there anything you would like to tell me about?" According to Driscoll, LaPlante responded: "Yeah, that guy's always down here to try and drum up votes for something. I keep walking away from him, he keeps following me . . . . I mean, the guy would follow you everywhere."

[15] In Blakely's written statement, unlike in Driscoll's account of what Blakely said, there is no indication that Mace was aware of Blakely's recent promotion to supervisor.

I conclude that Driscoll strained to portray any information he received about Mace's union activities in the light most favorable to the Respondent. For example, Driscoll testified that employees complained that Mace was interfering with their ability to work. However, neither of the two written "complaints" introduced as exhibits by the Respondent includes any mention of Mace interfering with the employee's work. To the contrary, Taft stated that he "just i[g]nored" Mace, and Blakely indicated that he chose when to end both conversations with Mace. I also found somewhat implausible Driscoll's testimony that he received multiple complaints about Mace interfering with other employees' work, given that he never warned Mace to discontinue such conduct prior to suspending/discharging him. Indeed, Driscoll himself said that he reacted to the complaints from Auger and Baker by promising to tell Mace to stay away from their work areas. Rather than having such a conversation with Mace, or giving Mace an opportunity to change his behavior, Driscoll jumped to the drastic measure of suspending/terminating Mace.

I also consider it telling that the Respondent failed to call a single one of the purported complaining individuals as witnesses. Two of those individuals, Baldack and Blakely, were current supervisors who one would assume to be favorably disposed towards the Respondent. Yet the Respondent did not call either individual as a witness, or explain its failure to do so. The Board has held that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1122–1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988) (Table); *Electrical Workers Local 3 (Teknion, Inc.*), 329 NLRB 337, 337 fn. 1 (1999); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) ("Normally it is within an administrative law judge's discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party . . . , particularly when that witness is the party's agent and thus within its authority or control."). For the reasons discussed above, I find that the Respondent has not shown that Driscoll received complaints that Mace was intimidating, or interfering with the work of, other workers, or that Mace was failing to perform his own work.

Driscoll also testified about the policy on solicitation and distribution that the Respondent forwards as a basis for Mace's termination. There was no evidence showing that this policy existed prior to the union campaign or that it was set forth in written form. Indeed, Driscoll admitted that, prior to Mace's termination, he had never disciplined, much less terminated, an employee for engaging in solicitation or distribution, even though the evidence showed that nonunion solicitation and distribution was commonplace. Not only was no written policy produced, but the Respondent's officials did not describe the purported policy on solicitation and distribution with any consistency. During the meeting that Donahue (director of operations) held with warehouse employees in July 2008, he warned that "there should be no union activity on the property," and that such activity was a "terminatable offense." Driscoll, on the other hand, stated that it would not be a violation of the policy for two employees to discuss the Union when they were on break or when they were performing work tasks, side-by-side, in the warehouse. Driscoll did not clearly state what would constitute a violation of the purported policy on solicitation and distribution, but he did indicate it was impermissible for an employee to engage in any solicitation that interfered with other employees' performance of their work duties.

E. Crane Receives Written Warnings

As discussed above, Crane was a truckdriver who assisted the Union by distributing union authorization cards and literature, talking to employees about the Union, signing a union card, and attending a union meeting. Crane also spoke during the July 11 meeting that the Respondent held with drivers to campaign against the Union. At that meeting, Crane complained that the Respondent was not paying the drivers to attend the meeting. When Donahue asked why employees would want union representation, Crane responded by raising the Respondent's inattention to a safety issue. Crane's union support was public enough that, in August, an antiunion employee (Belanger) confronted Crane about the Union. When Crane later tried to explain his position to Belanger, Belanger walked away and went to talk with Driscoll.

Crane began working for the Respondent as a driver in September 2007, and, prior to September 2008, had never received a disciplinary write-up of any kind from the Respondent.[16] On September 14, Crane received two written warnings simultaneously. The first concerned a 6-week old incident in which Crane allegedly violated security policy by entering a Starbucks store to make a delivery at a time when the store's safe was open. The incident occurred on July 29, and was reported to the Respondent on July 30. According to the Respondent's records, store personnel complained that Crane was discourteous when asked to wait outside until the work regarding the safe was completed and the safe was locked. The Respondent did not explain why the Respondent issued this discipline so long after the incident. The second write-up that the Respondent issued to Crane on September 14, was based on a complaint from store personnel that Crane was throwing cases of product from his truck and being unpleasant to staff on September 4. Crane denied throwing product. According to him, the truck was so overloaded that when he opened the door, some of the product fell out on its own.[17] None of the product was damaged. Crane testified that no one from the store had

[16] I credit Crane's reliable testimony that the September 14, 2008, write-ups were the first he had received from the Respondent. Tr. at 151–152. Driscoll offered testimony on the subject that was arguably contrary to Crane's, but his testimony was less consistent than Crane's and is outweighed by it. At first, Driscoll testified that he did not think Crane had been disciplined previously. Then he said he thought Crane had previously been disciplined, but he could not remember what conduct Crane had been disciplined for. Tr. at 498–499. The Respondent did not introduce documentation showing that Crane received discipline prior to September 2008.

[17] Crane drove one of the straight trucks, although he was qualified to drive one of the larger tractor-trailer trucks.

spoken to him about throwing or dropping product. Crane was the only witness to this incident who testified.

A few days after the two September 14 write-ups, Crane received a third write-up. This one concerned a September 8 incident that took place at the Respondent's warehouse after Crane had completed his route and was removing empty trays from his truck. The Respondent's disciplinary report states that Crane had thrown trays in the way of warehouse workers who were unloading incoming product. According to the disciplinary write-up, Crane cursed at the warehouse workers and stated "I do not get paid by the hour and I worked more than 10 hours today." Crane told a warehouse supervisor that he should direct the warehouse workers to stay out of the way. Crane admitted to making statements along the lines of those described in the write-up and to using the word "fuck" during the exchange with the nonsupervisory warehouse workers. However, he testified that the incident was precipitated when Taft, a warehouse worker who strongly opposed the Union,[18] repeatedly backed a pallet jack into the empty trays as Crane was attempting to unload them from his truck. Crane testified that a second warehouse worker stopped just short of running into him with a pallet jack. Crane reported this incident to two warehouse supervisors, and told one that he should keep the warehouse workers out of the way. Aside from Crane, no witness to this incident was called to testify.

Driscoll admitted that the Respondent rarely issued written warnings to employees based on store complaints such as those received about Crane. The record evidence confirms this. It shows that the Respondent rarely if ever disciplined other drivers when store personnel complained about conduct comparable to Crane's. The first write-up Crane received states that he breached security policy by entering a store when the safe was open. The record shows that during the period from October 2006, until Crane's discipline on September 14, 2008, there were numerous occasions when drivers breached security policy by failing to relock a store's door and/or failed to reset the store's alarm after completing a delivery. The Respondent's record of store complaints, includes the following reports: "door not locked; alarm not set" (11/6/07); "store called in, their alarm was not set" (11/23/07); "f[ront]o[f] h[ouse] door left open" (12/16/07); "driver did not lock the front door after he made the delivery" (3/28/08); "store called in to report that the driver left their side door open and the alarm went off and the police came" (5/10/08); "store reported that their front door was left unlocked last night" (5/14/08); "keys left in front door . . . alarm not set" (5/16/08); "driver did not shut off or arm the alarm . . . it was tripped" (5/26/08); "alarm not being set for last 3 nights," (6/6/08); "both sets of doors were left unlocked last night" (7/31/08); "alarm not set" (8/11/08); "front door was left unlocked last night" (9/5/08); "door was unlocked when [store personnel] arrived" (9/13/08). Although the Respondent's record of store complaints contains a space to enter the "action" taken with respect to each complaint, no disciplinary action is reported for any of these incidents. Indeed, Driscoll was unable to recall any discipline for these incidents, although he testified that he believed a driver who left the keys to a store hanging in its door after completing a delivery received discipline.

Regarding the complaint that Crane was discourteous to store staff, the evidence indicates that such complaints about other drivers were also common. The Respondent's records for 2008 show that store personnel complained that: on 4/28, a driver "had words" with a store employee while making a delivery; on 6/19, a driver engaged in "rude behavior" after delivering a broken, soaked, and incomplete order; on 6/20, a driver was "confrontational" with store employees and refused to put the delivery in the proper location; on 8/26, a driver was uncooperative with store personnel about an incorrect delivery; and on 8/26, a driver was "unpleasant" and mishandled the store's pastry order. However, neither the Respondent's report of store complaints nor the disciplinary records introduced at trial list any action for the incidents of discourtesy described immediately above. The Respondent did not claim that the employees involved in these other incidents of discourteous conduct were disciplined. Driscoll remembered the incident regarding the driver who engaged in "rude behavior" with store staff on June 19, and admitted that the employee was not disciplined.

The Respondent does identify one driver who received warnings for discourteous conduct in November and December 2007. The driver in that case, Ed Cassady was reported to be discourteous to a Starbucks *district manager*, not, like Crane, to store employees. Moreover, the store had complained that Cassady wore clothes that exposed his tattoo of a topless woman even after the Respondent discussed the tattoo with Cassady. In one instance, Cassady blocked a store customer's car with his truck, refused to move the truck when the customer asked him to do so, and appeared indifferent to the trouble he was causing the customer. The record does not show that anyone was disciplined for discourteous conduct during the 18 months between when Cassady was disciplined and when Crane was disciplined, or ever during the period after Driscoll arrived to manage the facility. This is true despite the multiple complaints of discourteous conduct by other drivers that are documented in the exhibits covering the period close in time to when Crane was warned. Driscoll testified that the Respondent's policy is that drivers must be courteous and helpful with store personnel. On its face this is obviously a reasonable policy, but the record does not show that the Respondent applied the policy to other drivers in the same way as it did to Crane.

The second disciplinary write-up received by Crane concerned an incident in which store personnel reported that Crane had thrown product from his truck. As discussed above, Crane testified that he did not throw the product, and there is no dispute that the product was undamaged. At any rate, the record reveals that the Respondent receives store complaints about mishandled and damaged product on almost a daily basis. The incidents of this referenced in the record are too numerous to recount here, but include the following: "driver broke gallon of milk & half & half; did not tell anyone about it and did not clean it up" (10/6/07); "the driver left their . . . fridge open[;] all

[18] The record reveals that this is the same Tommy Taft who made a report to the Respondent concerning Mace's union activity. Although the record indicates that the Respondent has two employees named Tommy Taft, only one of those individuals worked in the warehouse and the individual who had the run-in with Crane was a warehouse worker.

was lost" (12/26/07); " fridge left open; all was lost" (2/28/08); "received pastries that were crushed due to double stacking" (3/13/08); "this driver for the 2d time has left their fridge door open and all breakfast was lost plus their paper order has been thrown all over the place" (3/31/08); "driver setting heavy items on top of lunch items crushing product; happening frequently" (7/20/08); "poor deliveries; products smashed; product not in totes or trays" (8/26/08); "[driver] mishandling their pastry" (8/26/08). The Respondent's record of store complaints does not include an "action taken" entry for any of these complaints. The Respondent did not claim, much less prove, that any of the drivers involved with these deliveries were disciplined. Indeed, Driscoll conceded that during his tenure the drivers had never been disciplined because they made deliveries that were damaged due to how the product was stacked, and that he did not know of any drivers who were disciplined for delivering damaged product during the period from April to September 2008.

Crane's third write-up concerned his run-in with Taft and another warehouse worker. The Respondent does not explain why the Respondent chose to discipline Crane, rather than the other participants, for the incident. It was Crane who complained to supervisors about what had transpired, not the other employees who had complained about Crane. It is true that Crane used an expletive during the exchange with Taft, but witnesses for both sides agreed that employees working at the Respondent's facility used such language on almost a constant basis. Driscoll admitted that other employees used expletives during arguments with one another, but that he had never disciplined anybody for this until he disciplined Crane. Transcript at 539–540.[19] Indeed, in the written statement that Blakely gave to the Respondent, he reported that he had called Mace "full of shit," but it was Mace, not Blakely, who was disciplined as a result of that exchange.

In its brief, the Respondent claims that the third warning was for inappropriate behavior towards a coworker and supervisor. After carefully reviewing the record evidence on this subject, I conclude that the stated reason for this discipline was Crane's conduct towards the coworkers, and that the record does not establish that he engaged in insubordinate behavior or that his complaint to the warehouse employees' supervisors was a basis for the discipline. The disciplinary report notes that Crane "approached [the supervisor] demanding that he should get the [coworkers] out of his way," but does not substantiate that his exchange with the supervisor, as opposed to his exchange with the coworkers was a basis for the discipline. In the disciplinary report regarding this incident the lines for "carelessness," "safety/work habit," "conduct," and "copolicy/other" are all checked as reasons for the discipline, but the line for "insubordination" is not checked. See *ADB Utility Contractors*, 353 NLRB No. 21, slip op. at 1 (2008) (an employer fails to meet its burden of showing that it would have taken the same action absent the discrimination, when the evidence establishes that the reason forwarded was not in fact relied upon); *Structural Composites*, 304 NLRB 729, 729–730 (1991) (not enough to show that it could have taken the action it did for the reasons given, rather must show that it would have taken the action for the reasons given).

F. Beattie, Adorno and Glover Discharged from Positions as Drivers

On September 15 and 16, the Respondent terminated drivers Beattie, Alexander Adorno, and Anthony Glover. The reason the Respondent gives for this action was that, as of September 15, every one of its drivers was required to have a Class A commercial driver's license (Class A CDL or Class A license), and each of these drivers had only a Class B commercial driver's license (Class B CDL or Class B license). Two of the drivers, Beattie and Adorno had obtained Class A permits, but not licenses, as of the time the Respondent informed them that they were being terminated. Adorno and Glover asked Driscoll whether they could have additional time to satisfy the new licensing requirement, but Driscoll denied their requests. Driscoll offered all three drivers continued employment, but as warehouse workers rather than drivers.[20] This change in assignment would result in a significant decrease in pay since, as drivers, these employees had been paid by the "trip" at an approximate rate of $23 to $26 per hour, while as warehouse employees they would earn $12 to $13.50 per hour.[21] None of the three drivers accepted the offer of a position in the warehouse on a permanent basis, and only Beattie agreed to work out the week in the warehouse.

The General Counsel argues that the Respondent imposed the Class A CDL requirement to eliminate Beattie—the prime mover of the union effort—from its work force and that Adorno and Glover were "swept up in [the] negative employment action as cover for the discriminatorily motivated act." The Respondent counters that Beattie's union activity played no part in the imposition of the new requirement. Driscoll denied that Beattie's union activity was a factor. The Respondent argues that the evidence shows that the new licensing requirement was necessitated by the expansion of the Respondent's business, and that the drivers were given advance notice and offers of assistance designed to make it possible for them to obtain the Class A licenses in time to continue working for the Respondents as drivers.

[19] The record shows that one individual, who had previously received training on sexual harassment, was given a written warning after he continued to use language that the Respondent said could be considered sexually harassing. In this case there is no suggestion that Crane used the expletive in a way that the Respondent considered, or which one could reasonably consider, sexual harassment.

[20] Driscoll testified that he offered to retain all three drivers as warehouse workers, and Beattie and Glover each corroborated that Driscoll had made such an offer. Adorno stated that Driscoll told him he would have to apply for the warehouse position. I credit Driscoll's testimony that he offered all three drivers, including Adorno, the warehouse position, not just the opportunity to apply for it. Driscoll testified reliably on that point and his testimony was lent credence by that of Beattie and Glover. The record does not suggest any reason why Driscoll would offer the warehouse positions to Beattie and Glover, but require Adorno to apply for such a position.

[21] The warehouse work would be at the drivers' current rate of pay for the rest of the week, but after that they would earn what warehouse workers were paid.

When questioned about the decisionmaking process that led to the Respondent's adoption of this new licensing requirement for drivers, Donahue was able to testify in only the vaguest of terms. He stated that he probably engaged in one phone conversation with "officials" in the Respondent's Maryland office on the subject. Regarding the question of when the decision was made, Donahue could not be more specific than to narrow his answer to a 3-month period, stating "back in May–April, May, June in that area." When asked who made the ultimate decision he was again quite vague, responding that it was a "collaborative effort on all parts." He testified that he made the decision along with "my team in Maryland and [Driscoll] and my team here." Later, when pressed, he stated that the discussions were "mostly probably by phone," and that he spoke to one person in "corporate." There are no documents regarding the meetings that led to the decision or of any proposals or rationales that were considered.

The record shows that when the Respondent began operations it hired drivers who had either a Class A license or a Class B license. The main difference between these two categories of drivers is that those with Class A licenses are permitted to drive either tractor-trailer trucks or straight trucks, whereas those with Class B licenses are only permitted to drive straight trucks. A tractor-trailer is a truck with two discrete elements—the tractor that tows a trailer, and the trailer that holds the cargo. A straight truck, on the other hand, is one unit with the tractor and cargo compartment mounted on the same chassis. The Respondent has used both tractor-trailers and straight trucks, but the tractor-trailers have far more cargo space.[22] The Respondent no longer operates straight trucks for store routes. Two straight trucks are still regularly used to pick up fresh sandwiches and pastries and bring them back to the Respondent's Canton facility.

By the end of August 2008, all but three of the Respondent's 50 to 55 truckdrivers had Class A licenses. The only drivers still working with Class B licenses were Adorno, Beattie, and Glover. During their 2007 performance reviews, each of these drivers mentioned upgrading to a Class A license as a goal for the coming year. In July 2008, the Respondent told Adorno, Beattie, and Glover to obtain permits to learn to drive Class A trucks. In order to obtain the permit these drivers would have to pass a written test and undergo a background check. According to credible testimony, this test is not particularly difficult to pass, requiring that the driver study approximately 6 pages worth of material, and then answer 16 out of 20 multiple choice questions correctly. The Respondent also told the drivers that they had to obtain Class A *licenses* by September 15, 2008, but the parties dispute whether this requirement was communicated in the first part of July 2008 or in early September 2008. To obtain a Class A license an individual must demonstrate familiarity with various parts of the tractor-trailer, correctly perform several driving maneuvers, and then pass a road test.

[22] The storage compartment of the Respondent's trailers is generally 36-feet long, whereas the storage compartment on the straight trucks is only 20- to 24-feet long. The cargo compartments of the trailers are also 9 inches wider than the cargo compartments of the straight trucks.

The parties presented a great deal of evidence regarding the factual question of whether it was on July 11 or on September 4 that the Respondent announced the September 15 deadline for obtaining Class A licenses. This factual dispute is a significant one. Two weeks is, by all accounts, an insufficient amount of time for a driver with a Class B license to train for, and obtain, a Class A license. Therefore, if the Respondent did not inform the drivers of the September 15 license deadline until early September it would lend credence to the General Counsel's contention that the Respondent imposed the new licensing requirement not because it hoped the Class B drivers would meet it, but so that Beattie could not meet it.

On the other hand, if the drivers were given from July 11 until September 15, the implications are more complicated since that is a short, but not necessarily unworkable, time period. The General Counsel presented credible testimony that the Union's own educational program requires a candidate for a Class A license to train 20 hours a week for between 6 and 8 weeks, and is rarely completed by anyone working full-time. Most courses require a total of between 120 and 160 hours of training. In addition, the individual would have to begin by taking and passing the written permit examination. Commercial driving schools charge $5000 or more to train individuals to become Class A licensed drivers. The Respondent, in an effort to show that a motivated full-time driver could meet the requirements within the time it was allowing, presented the testimony of Carlos Marques. Marques was a Class B driver with the Respondent who obtained a Class A permit in April. He presented himself to take the test after approximately 5 weeks of training, but was unable to proceed with the test at that time because of equipment problems. He presented himself to take the test again shortly thereafter, but again equipment problems prevented him from going forward. In July, Marques took the driving test for a Class A license and passed it. It cost Marques only $90 to obtain his Class A license because of the assistance provided by the Respondent.

The parties presented conflicting testimony regarding the timing of the notification. Driscoll testified that in July 2008, he met with Adorno, Beattie, and Glover, and informed them that they had to obtain Class A licenses by September 15 in order to continue their employment as drivers with the Respondent. He testified that he told the drivers that the Respondent would provide training and other assistance to help them obtain the licenses. Driscoll also testified that on July 12, he posted the memorandum (dated July 11) from David Robitaille (transportation manager), which stated that, after September 15, 2008, the Respondent would only employ drivers with Class A licenses. This requirement was being imposed, the memorandum explained, "[i]n order to meet the delivery requirements of Starbucks." The memorandum urged the drivers to obtain a Class A permit "as soon as possible." The memorandum further stated that after a driver obtained the Class A permit, the Respondent would help the driver obtain the Class A license by: having its experienced Class A-licensed drivers provide training to the Class B-licensed drivers; making tractor-trailers available to drivers so that they could practice driving skills when they were off-duty; providing a tractor-trailer for the driver to use during the road test; arranging to have the driver

accompanied to the road test by a "sponsor" driver who had a Class A license; paying the cost of the driver's first road test for the Class A license; and paying the cost of additional road tests if the individual failed because of a problem with the equipment provided by the Respondent. Driscoll testified that he posted the memorandum from Robitaille on the door to the dispatch room where drivers came for their paperwork and that the memorandum was also posted on the door to the drivers' breakroom. These were locations where notices to drivers were typically posted. According to Driscoll, the memorandum was still posted in September 2008.

Driscoll's testimony regarding the timing of the notice was corroborated to a significant extent by that of Marques. Marques testified that in July 2008 he saw the July 11 memorandum from Robitaille posted on the door to the "driver's room" where the drivers came for their paperwork. As discussed above, that memorandum stated that each of the Respondent's drivers would have to obtain a Class A driver's *license* by September 15. The testimony of Driscoll and Marques regarding the July posting of the memorandum dated July 11 is further supported by the testimony of Donahue, who stated that he saw the July 11 memorandum posted in early July.

At trial, Adorno, Beattie, and Glover all denied that the Respondent notified them of the impending Class A license requirement in July. They testified that during the July discussions, Driscoll said it would be sufficient to obtain a Class A *permit* by September 15. Beattie stated that Driscoll told him this immediately following the July 11 meeting that the Respondent held to urge drivers not to support the Union. Adorno, Beattie, and Glover testified that it was not until approximately September 4—less than 2 weeks before the deadline—that Driscoll said they would have to obtain Class A *licenses* by the deadline. In addition, Beattie and Glover testified that although the memorandum stating that drivers had to have Class A licenses by September 15 was dated July 11, it was not until September that they saw any version of that memorandum.

After considering the record evidence and the demeanor of the witnesses, I credit the testimony of Driscoll, Marques, and Donahue that it was early in July 2008 when the Respondent announced that all drivers would have to have a Class A license by September 15. Driscoll testified that in July he personally provided oral notice of the change in license requirements to the three drivers and that on July 12 he posted the July 11 memorandum regarding the change where that memorandum would be seen by drivers. His testimony on these points was clear, certain, and consistent, and was not impeached. Marques testified under subpoena from the Respondent and was not shown to have taken any position regarding the Union or to have a personal interest in the outcome of this proceeding. His demeanor was calm and measured and his credibility was not undermined in any meaningful way.

The contrary testimony that was provided by the alleged discriminatees regarding the timing of the notice provided to the drivers was less credible. Some of that testimony was inconsistent or was impeached significantly. For example, when Glover gave his initial affidavit to the Board he stated, contrary to his later trial testimony, that *in July 2008*, Driscoll told the drivers that they had to obtain Class A *licenses* by September 15. In fact, in his affidavit, Glover twice mentions July as the month when the Respondent notified him about the new licensing requirement. Thus the account in Glover's initial affidavit actually lends corroboration to the testimony of Driscoll and Marques. When cross-examined about the change in his recollection, Glover's only explanation was that he had shown the affidavit to Beattie and that Beattie had "refreshed in [his] mind" that the conversation about Class A licenses had actually taken place in September. Glover testified that he had shown his affidavit to Beattie because they were "all in this together." I consider Glover's recantation of this significant element in his affidavit suspect, especially considering that the affidavit was given on October 21, 2008, relatively close in time to the events at issue, that the July notification was mentioned twice in the affidavit, and that Glover's change of heart was brought about by Beattie's examination of the affidavit. Glover's prior affidavit significantly undermines the credibility of his trial testimony on this subject, and leaves that testimony far less credible than the contrary testimony of Driscoll, Marques, and Donahue.

Glover's testimony was also internally inconsistent and uncertain in other respects. For example, when testifying about the July meeting between Driscoll and the three drivers, Glover stated that Driscoll had specifically been asked whether he was talking about Class A licenses or only Class A permits, and had answered that the drivers only needed the permits. When Glover was asked if he was the one who posed that question to Driscoll, he answered ambiguously, "Yes, it was all of us." When pressed on the subject he shifted and said that it was not himself, or "all of us," but Beattie, who had asked the question. All in all, I was left with the impression that Glover was straining to provide testimony on this subject that was favorable to his own interests and the General Counsel's case.

Adorno appeared ill-at-ease and uncertain on the stand when testifying about the timing of the notice regarding the new license requirement. He testified that he was not told about the Class A license requirement until 2 weeks before the September 15 deadline, but when shown a version of the Robitaille memorandum, dated July 11, which set forth the requirement, Adorno was initially unable to say when he had first seen the memorandum, stating: "The date I'm not sure. I can't recall exactly when I got this, but I do remember receiving it though." When asked whether he remembered seeing the memorandum posted on the door to the drivers' room, Adorno did not deny seeing it, but rather answered, "I can't recall, sorry." He also gave inconsistent testimony on other matters. For example, he first stated that he had not been told about the availability of company-provided training for the Class A license in the summer of 2008, then stated that he had been told about the availability of such training in July 2008, and then stated that it was "like a little bit before September 2008." Transcript at 250–251, 257–258. Similarly, Adorno initially denied that after he obtained his Class A permit the Respondent placed him in a tractor-trailer with a Class A driver, but then, when questioned further, he conceded that the Respondent had done that. Transcript at 252–253. Based on these factors, and the record as a whole, I do not believe that Adorno was a reliable witness on the ques-

tion of when the Respondent announced the new licensing requirement.

I also found Beattie less credible than Driscoll and Marques on the subject of when the drivers were notified that they would be required to obtain Class A licenses. Beattie testified in a very guarded manner. With unusual frequency he couched his answers as being "to the best of my recollection" or merely "my recollection."[23] In other instances he appeared more interested in disagreeing with the Respondent's counsel than in answering questions forthrightly.[24] Moreover, Beattie's testimony that in July he was told that he only needed to get a Class A permit by September 15 does not ring true. If that were the case I would have expected Beattie to have obtained a Class A permit by the September 15 deadline. By his own admission, however, Beattie did not obtain either a Class A license or a Class A permit by the deadline, but rather obtained the permit on September 16—a day past the deadline, and only after the Respondent enforced the deadline with respect to Adorno and Glover on September 15.[25] Overall, I was left with the impression that Beattie allowed his personal stake in the outcome of the union campaign and this adjudication to influence his recollection, and I consider his testimony on this subject to be less reliable than that of Marques, Driscoll, and Donahue.

The General Counsel urges me to draw an adverse inference from the Respondent's failure to call Robitaille to testify regarding what the company communicated to the drivers in July about new licensing or permit requirements. At the time of trial, Robitaille was no longer working for the company in any capacity. An adverse inference is only proper if it can reasonably be assumed that Robitaille was favorably disposed to the Respondent. See *International Automated Machines, Inc.*, 285 NLRB at 1123. Given that Robitaille no longer works for the Respondent, and the lack of evidence regarding the circumstances of Robitaille's separation from the company, I do not assume that he was favorably disposed towards the Respondent at the time of trial. Therefore, I decline to draw any inference based on the Respondent's failure to present Robitaille as a witness. See *Reno Hilton*, 326 NLRB 1421, 1421 fn. 1 (1998), enfd. 196 F.3d 1275 (D.C. Cir. 1999), and *Goldsmith Motors Corp.*, 310 NLRB 1279, 1279 fn. 1 (1993). I note, moreover, that the General Counsel did not call a single employee, other than the alleged discriminatees, to prove its contention that the July 11 memorandum was not published to employees in July, as testified to by Driscoll, Marques, and Donahue.[26]

G. The Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1): in about July 2008, when Driscoll interrogated employees about union activities and created the impression that union activities were under surveillance; on about July 24 and August 4, 2008, when Driscoll and Baldack interrogated employees about union activities. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) of the Act: on about July 24, 2008, when it suspended Mace because it mistakenly believed that he was engaged in unprotected conduct while he was engaged in union and other protected concerted activities or, in the alternative, because Mace and other employees engaged in union and concerted activities and in order to discourage such activities; on about August 4, 2008, when it terminated Mace because it mistakenly believed that Mace was engaged in unprotected conduct while he was engaged in union and other protected concerted activities or, in the alternative, because Mace and other employees engaged in union and concerted activities and in order to discourage such activities; on about September 4 and 9, 2008, when it issued warnings to Crane because he and other employees formed, joined, or assisted the Union and engaged in concerted activities and in order to discourage such activities; on about September 15, 2008, when it informed Adorno, Beattie, and Glover that they could no longer be employed as drivers, but could remain with the Respondent as warehouse workers for significantly lower compensation because those individuals, and other employees, engaged in union and concerted activities, and in order to discourage such activities.[27]

Analysis and Discussion

I. SECTION 8(a)(1)

A. Interrogations

The General Counsel alleges that the Respondent coercively interrogated employees in violation of Section 8(a)(1) on multiple occasions in July. An interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292–293 (1990). Relevant factors include, whether

[23] See, e.g., Tr. at 26, L. 7; Tr. at 31, L. 6; Tr. at 37, L. 1; Tr. at 52, L. 19; Tr. at 66, LL. 1, 4 and 20; Tr. at 84, L. 13.

[24] See Tr. at 82 (in discussing training that the Respondent offered drivers, Beattie first states that Driscoll offered training on "all aspects" of tractor-trailer driving and when Respondent's counsel seeks to confirm this, Beattie retracts that testimony, stating "not on all aspects"); Tr. at 88, LL. 1 and 12–14 (Beattie first states that a driver must learn four driving maneuvers in order to qualify for Class A license, and when his testimony is stated back to him by counsel for the Respondent, Beattie says "I think there's more than four").

[25] On September 15, the Respondent informed Adorno and Glover that their employment as drivers was terminated because they had not obtained Class A licenses. Beattie was not at work on September 15. Although the Respondent's personnel records state that Beattie was terminated on September 15, the parties agree that the Respondent did not inform him of this until Beattie appeared for work on September 16.

[26] In its brief, the General Counsel urges me to find, based on some feint markings on the document, that the July 11 memorandum was fraudulent and was "manufactured after the fact to try to justify the retaliatory imposition of a strict September 15 deadline for obtaining the Class A licenses." That serious charge is not supported by record and is rebutted by Marques' credible testimony that he saw the July 11 memorandum posted in July.

[27] The complaint, as issued by the Regional Director, also included multiple allegations that the Respondent had unlawfully disciplined employee Lucknerson Medy. When the trial opened, I granted the General Counsel's unopposed motion to remove those allegations from the complaint.

the interrogated employee was an open or active union supporter, whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18–19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177–1178 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

1. Driscoll Questions Glover: The General Counsel alleges that the Respondent engaged in an unlawful interrogation in July when Driscoll contacted Glover by phone while Glover was driving his route and asked Glover to divulge what he knew about the conversations Beattie was having with other drivers. I agree that this was an unlawful interrogation. I note that Driscoll was not Glover's direct supervisor, or even the transportation manager, but a higher level official to whom Glover's direct supervisors reported. The Board has viewed the fact that an interrogator is a high-level supervisor as one factor supporting a conclusion that the questioning was coercive. See, e.g., *Stoody*, supra. Moreover, it was unusual for Driscoll to phone Glover while he was driving his route, much less to do so to talk about something other than deliveries. The fact that the questioning took place while Glover was driving exacerbated the coercive nature of the interrogation because it meant not only that Glover was isolated from other employees, but also that he had to formulate a response while continuing to operate his truck.

Driscoll did not mitigate the coercive nature of the interrogation by offering Glover assurances that the purposes of the inquiry were benign or that the way he responded would not result in adverse consequences for Glover or others. To the contrary, Driscoll tightened the screws by warning Glover to be "real frank . . . real serious" in his answers. This would reasonably suggest to Glover that the Respondent was considering taking some action based on Beattie's activities and that how Glover answered could likely have consequences for himself or others.

In reaching my conclusion that the questioning unlawfully interfered with protected union activity, I considered that Driscoll did not specifically mention union activity when he asked about Beattie's conversations with drivers. However, it was common for employees to discuss nonwork matters while working at the Respondent's facility and the record suggests no reason, other than a desire to find out more about the recently discovered union campaign, for Driscoll's decision to single out Beattie's conversations with other drivers as the subject of an interrogation. Nor did Driscoll claim that he had reason to believe that Beattie's conversations with the other drivers were unprotected. In addition, Glover was a friend of Beattie's who, by approximately the time of Driscoll's phone call, was aware of the union campaign. Such an employee would reasonably understand that the reason Driscoll asked about conversations a leader of the union campaign had with other employees was that Driscoll was attempting to uncover information about the union activity. Given the totality of the circumstances, I conclude that Driscoll's interrogation of Glover reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.[28]

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) in July when Driscoll coercively interrogated Glover about Beattie's conversations with other drivers. See *Gardner Engineering*, 313 NLRB 755 (1994) (employer violated the Act by interrogating an employee who was not an open union supporter about the union activity of others).

2. Driscoll Questions Mace: The General Counsel also alleges that the Respondent coercively interrogated Mace in violation of Section 8(a)(1) when Driscoll questioned him on July 24, and again the following week. I conclude that the General Counsel has established this violation as well. The Respondent's questioning of Mace directly concerned, and sought information about, Mace's union activities. Under the circumstances, Mace would reasonably find this questioning coercive and intimidating. First, the interrogating individual—Driscoll—was a high level official to whom Mace's supervisors reported. The questioning took place in the office of Donahue, the highest ranking official at the Respondent's facility. It was held in the presence of a second supervisor and out of the presence of other employees. Driscoll injected a hostile tone into the interrogation—stating that he knew Mace was organizing for the Union and then linking that union activity to accusations of misconduct. Moreover, at the time of the interrogation, Mace had chosen not to reveal his union views to the Respondent. Although he was a leader of the campaign, Mace did not wear or display union paraphernalia and during the meeting with Driscoll he tried to keep his union activity secret from the employer by stating that he had "nothing to do with the Union."

Driscoll's questioning of Mace during the following week was in certain respects more coercive than the July 24 interrogation. By then, Driscoll had informed Mace that the Respondent was considering "further disciplinary action up to and including dismissal." Thus Mace entered the interview with the knowledge that his continued employment was hanging in the balance. Although Driscoll testified that the purpose of the meeting was to hear Mace's side of the matter, no witness recounted any questions directed to that subject. Rather, Driscoll again took a hostile tone—stating that Mace had lied, and, in particular, that Mace had lied about "looking for union votes" and handing out literature. The fact that Mace had untruthfully claimed that he had no involvement in the union campaign does not change the coercive character of the questioning. Indeed, the coercive nature of the questioning is underscored by the fact that Mace was fearful of acknowledging his protected activity to Driscoll. See *United Services Automobile Assn.*, 340 NLRB 784, 794 (2003), enfd. 387 F.2d 908 (D.C. Cir. 2004). Applying the relevant factors, I conclude that Driscoll's questioning of Mace was unlawfully coercive.[29]

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[28] In its brief, the Respondent does not make any legal argument supporting its position that this, and the other discussions with employees, did not violate Sec. 8(a)(1). Rather, the Respondent sets forth the general standard for finding an 8(a)(1) violation, and summarily states that there is no evidence of such violations. R. Br. at pp. 33 and 40.

[29] I reject the notion that the Respondent was simply investigating complaints that Mace had intimidated or interfered with other workers,

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) when Driscoll coercively interrogated Mace on July 24, and again approximately 1 week later.

B. Impression of Surveillance

The General Counsel alleges that when Driscoll phoned Glover to talk about Beattie, he not only engaged in an unlawfully coercive interrogation, but also unlawfully created the impression of surveillance. "When an employer creates the impression among its employees that it is watching or spying on their union activities, employees' future union activities, their future exercise of Section 7 rights, tend to be inhibited." *Robert F. Kennedy Medical Center,* 332 NLRB 1536, 1539–1540 (2000). Therefore, an employer violates Section 8(a)(1) by creating such an impression. Id. The employer's conduct is evaluated from the perspective of the employee and is unlawful if the employee would reasonably conclude from the statement in question that employees' protected activities were being monitored. *Rogers Electric, Inc.,* 346 NLRB 508, 509 (2006); *Robert F. Kennedy Medical Center,* 332 NLRB at 1540; *Tres Estrellas de Oro,* 329 NLRB 50, 51 (1999).

As discussed above, even though employees routinely engaged in nonwork discussions while working, Driscoll singled out conversations that Beattie, the lead union organizer, was having with other drivers and took the unusual step of calling Glover to ask what those conversations were about. An employee in Glover's position—who knew about the union campaign and was a friend of Beattie's—would reasonably assume that Driscoll was asking about Beattie's conversations with other drivers because the Respondent had information regarding Beattie's role in the union campaign and was keeping an eye on him. Cf. *Central Valley Meat Co.*, 346 NLRB 1078, 1080 (2006) (where employer knew about the prounion sentiments of the employee, supervisor's questions about the subject matter of union meetings reasonably created the impression that employee's union activities were being watched). Driscoll did not claim, either in his conversation with Glover or at trial, that he learned of Beattie's conversations with drivers from employees who had freely reported it, rather than through surveillance. Driscoll did not tell Glover, or claim at trial, that there was some reason, other than a desire to gather intelligence about Beattie's union activities, for the questioning. Under these circumstances, I conclude that Driscoll's questioning of Glover created the impression that the employees' union activities had been placed under surveillance by the employer.

For these reasons, I conclude that the Respondent violated Section 8(a)(1) by creating the impression that it had placed the employees' union activities under surveillance.

The General Counsel also alleges that the Respondent unlawfully created the impression that it had placed union activities under surveillance when Driscoll interviewed at least 14 individuals about Mace's conversations with other employees. However, the General Counsel presented no evidence about those interviews. The only evidence regarding how those interviews were conducted was Driscoll's testimony. In Driscoll's telling, he was not the one to broach the subject of union activity with any of these individuals, but simply received, or inquired about, reports that Mace was not working and was interfering with the work of others. The General Counsel invites me to conclude that Driscoll's version should not be credited, and, as discussed above, I do not credit his account of these interviews. However, since the General Counsel did not introduce any countervailing accounts, I am left without an adequate basis for finding what actually *did* happen during the interviews and, so, cannot determine that the interviews created the impression of surveillance. At any rate, I need not reach the question of whether those interviews unlawfully created the impression of employer surveillance, since I have already found that the Respondent's questioning of Glover constituted such a violation, and additional findings relating to the interviews about Mace would be cumulative and would not affect the remedy. See *Wisconsin Porcelain Co.*, 349 NLRB 151, 153 fn. 11 (2007); *DaimlerChrysler Corp.*, 344 NLRB 1324, 1324 (2005).[30]

since, as discussed above, the evidence did not establish that the Respondent received such complaints.

II. SECTION 8(a)(3)

A. Mace Suspended and Terminated

The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) when it suspended and then terminated Mace. As discussed above, Mace was the leader of the union campaign among the warehouse workers and the Respondent suspended/terminated him approximately 1 month after Driscoll found out about the union campaign. The Respondent argues that the following types of misconduct by Mace warranted his suspension/termination: interference with coworkers; failure to perform his own work; dishonesty towards management, including "l[ying] about soliciting and looking for union votes . . . handing out literature in the building"; and, violation of the no solicitation and distribution policy." The alleged misconduct upon which the Respondent relies to justify Mace's termination was all associated with Mace's solicitation and distribution on behalf of the Union.

There are two different analytical frameworks that arguably apply to the question of whether Mace's suspension and termination violated Section 8(a)(3) and (1) of the Act. The first, which the General Counsel argues is applicable, is governed by the Supreme Court's decision in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). The other, which the Respondent argues applies, was set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 US. 393 (1983). I conclude that under either analysis, the result is the same; the Respondent discriminated in violation of Section 8(a)(3) and (1) when it suspended and terminated Mace.

Under the *Burnup* analysis, the General Counsel must establish that the employee was engaged in activity protected by Section 7 of the Act, and that the employer took action against

[30] The General Counsel does not argue that the interviews relating to Mace's activities constituted coercive interrogations in violation of Sec. 8(a)(1), and the complaint does not explicitly claim that they did. Thus I do not consider that question.

the employee for conduct associated with that protected activity. *Detroit Newspapers*, 342 NLRB 223, 228 (2004). The burden then shifts to the employer to "establish that it had an honest belief that the employee engaged in the conduct for which he was discharged." Id. If the employer meets that burden, "the General Counsel must affirmatively establish that the employee did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge." Id.; *Akal Security*, 354 NLRB No. 11 (2009).

In this case, I conclude that Mace engaged in protected activity by soliciting and distributing literature on behalf of the Union and that the misconduct alleged by the Respondent was all associated with that activity.[31] Prounion solicitation and distribution, even during working time, is protected pursuant to Section 7 of the Act unless it is in violation of the employer's lawful rules. *Wal-Mart Stores, Inc.*, 349 NLRB 1095, 1095 fn. 6 (2007). An employer's limitation on solicitation or distribution during working time is not lawful if the prohibition is enforced disparately or selectively against employees engaged in prounion activity. See *SNE Enterprises*, 347 NLRB 472, 473–474 (2006), enfd. 257 Fed.Appx. 642 (4th Cir. 2007); *Clinton Electronics Corp.*, 332 NLRB 479 (2000), enfd. in part 284 F.3d 731 (7th Cir. 2002).

The Respondent urges me to find that Mace's prounion solicitation and distribution were in violation of lawful rules and therefore unprotected. The evidence is to the contrary. The record shows that nonwork discussions on a variety of topics, and solicitations for causes and products of various kinds, were common at the Respondent's facility, and occurred even during working time and in work areas of the Respondent's facility. Driscoll conceded that, prior to Mace's termination, he had never disciplined, much less terminated, any other employee for discussing nonwork subjects or soliciting. The record contains no evidence that the Respondent's purported policy on solicitation and distribution existed in writing or was ever announced to employees prior to the union drive. It was not even coherently described by the Respondent's officials. The only time the Respondent was shown to have articulated a restriction on solicitation and distribution to employees was during the antiunion meetings that Donahue conducted in July. Not only does that timing strongly suggest that the rule was motivated by the union campaign,[32] but Donahue expressed the rule in a way which revealed that it was directed at union solicitation. At the meeting for drivers, Donahue announced that *union* activity on company property was a "terminatable" offense. He did not state that the prohibition covered any other types of activities, or state the prohibition in a way that applied generally. At another meeting, this one for warehouse employees, Donahue compared individuals engaged in union solicitation to carpet salesmen, and said that he would not permit the sale of either the Union or carpets on company property. These pronouncements by Donahue did not constitute a lawful prohibition on solicitation and distribution, both because Donahue was singling out union activity, *SNE Enterprises*, supra, *Clinton Electronics*, supra, and because the rule as stated unlawfully extended to union solicitation and distribution activities engaged in by employees on their own time in nonwork areas of the facility, *Republic Aviation Corp. v.* NLRB, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394, 394–395 (1983).

Since the record shows that the misconduct the Respondent alleges Mace engaged in occurred in the course of protected prounion solicitation and distribution, the burden shifts to the employer to "establish that it had an honest belief that the employee engaged in the conduct for which he was discharged." *Detroit Newspapers*, 342 NLRB at 228; *Akal Security*, supra. The Respondent contends that it had a good faith belief that Mace was interfering with the work of others. As evidence, it relies on Driscoll's testimony regarding the complaints he received from, and interviews he conducted with, other individuals working at the facility. For the reasons fully discussed above, I do not credit Driscoll's testimony regarding these complaints and interviews. The only written statements in the record from such individuals do not complain that Mace disrupted their work, but simply report on his facially lawful union activities. Neither statement describes any opprobrious, abusive, or threatening behavior. Cf. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979) (employee is not free to carry out union solicitations in an opprobrious or abusive manner). Nor do these statements provide a good-faith basis for believing that Mace was failing to complete his own work.

The Respondent did have a good-faith basis for one of the reasons it forwards for Mace's termination—untruthfulness. However, under the facts presented here, that reason is itself an unlawful one. As discussed above, during an interrogation, Mace untruthfully stated that he did not have anything to do with the Union. This untruth, however, related to Mace's protected union activities, which he was not obligated to disclose. See *St. Louis Car Co.*, 108 NLRB 1523, 1525–1526 (1954). The Board has found that a discharge cannot be lawful when it is based on an employee's failure to fully respond to an unlawful interrogation. See *Hertz Corp.*, 316 NLRB 672, 692 (1995). Thus the fact that the Respondent offered Mace's untruthfulness as a reason for his termination does not show it has a defense, but rather lends support for finding a violation.

Even were I to conclude that the Respondent believed in good faith that Mace engaged in misconduct, I would conclude that the General Counsel has met its responsive burden of establishing that Mace "did not engage in such misconduct or that the misconduct was not sufficiently egregious to warrant discharge." *Detroit Newspapers*, supra. For the reasons discussed above, I found that Mace's prounion solicitation and distribution did not disrupt the work of others. Moreover, his conversations with other employees were not heated and he continued to complete his share, and probably more than his share, of

[31] The Respondent concedes that the allegedly improper conduct took place in the context of Mace's organizing work. R. Br. at 42 (describing it as a "fact" that Mace's alleged misconduct "occurred under the guise of union organizing).

[32] Timing is an important factor in assessing motivation in cases alleging discriminatory discipline based on union or protected activity, see, e.g., *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2005), enfd. 232 Fed. Appx. 270 (4th Cir. 2007); *Desert Toyota*, 346 NLRB 118, 120 (2005); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), enfd. sub nom.; *Carolina Holdings, Inc. v. NLRB,* 5 Fed. Appx. 236 (4th Cir. 2001); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994).

assignments during this period. As discussed above, Mace untruthfully denied his union activities when questioned by Driscoll, but Mace was not obligated to disclose those activities to the employer and his untruthful answers cannot be used to justify his termination.

Lastly, even assuming for purposes of argument that Mace engaged in some or all of the misconduct described by the Respondent, I do not believe that, under *Burnup*, the conduct was sufficiently egregious to warrant immediate discharge. Even in Driscoll's hearsay accounts, Mace did not engage in any opprobrious, abusive, or threatening behavior. After the Respondent purportedly received the complaints that Mace's prounion activities were interfering with coworkers, Respondent did not warn Mace or otherwise provide him with an opportunity to cease the conduct before terminating him. Given that the Respondent had previously allowed other types of solicitation and distribution by employees, I see no reason, aside from the union subject matter of Mace's communications, why the Respondent would leap to the drastic step of suspension/termination without advising Mace of the dim view it was taking of such interactions between employees. Indeed, Driscoll himself recalled telling employees Auger and Baker that he would advise Mace to stay away from them while they were working. This suggests that Driscoll himself recognized the appropriateness of such an intermediate step. But he skipped it. Instead, Driscoll proceeded immediately to suspending Mace pending his eventual termination. *Spurlino Materials, LLC*, 353 NLRB No. 125, slip op. at 24 (2009) (fact that severity of discipline is out-of-proportion to offense supports finding of discrimination). For these reasons, I conclude that, under the *Burnup* analytical framework, the Respondent unlawfully suspended and discharged Mace in violation Section of 8(a)(3) and (1).

If one analyzes Mace's suspension and termination using the standards set forth in *Wright Line*, supra, the result is the same—a violation of Section 8(a)(3) and (1). Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent's decision to suspend and terminate Mace was motivated, at least in part, by antiunion considerations. The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *ADB Utility Contractors*, 353 NLRB No. 21, slip op. at 1–2; *Intermet Stevensville*, 350 NLRB 1270, 1274–1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

In this case, there is no dispute that Mace engaged in extensive prounion activities during the period leading up to his suspension/discharge and the Respondent admits that it was aware of those activities at the time it took action against him. In addition, antiunion animus on the part of the Respondent is demonstrated by the record. During meetings that the Respondent required employees to attend, Donahue (director of operations) warned that union activity at the facility was a "terminatable" offense, and characterized reports that some employees wanted a union as "bad" rumors. As discussed above, the Respondent unlawfully opposed the Union campaign by coercively interrogating employees and creating the impression that union activities were under management's surveillance. This evidence of animus, in particular Donahue's statement that union activity at the facility was a "terminatable offense" is connected to the termination of Mace. Thus the General Counsel has met its initial burden of establishing discriminatory motive.

Since the General Counsel has established discriminatory motive, the burden shifts to the Respondent to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. As discussed above, one of the reasons given by the Respondent—Mace's untruthful denial of his union activity—is itself and unlawful since Mace was privileged under the Act to withhold information about such activity from his employer. See *Hertz Corp.*, supra, and *St. Louis Car Co.*, supra.

Regarding the other reasons forwarded to justify Mace's termination, I conclude that the Respondent has failed to meet its burden of showing that those reasons would have led to Mace's termination in the absence of the Respondent's discriminatory motivation. To the contrary, the evidence showed that Mace continued to complete his own work, did not disrupt others, and did not violate any lawful policy on solicitation and distribution. Moreover, the Respondent has failed to show that it had a good-faith belief to the contrary since Driscoll's testimony about complaints was not credible and the two written employee statements submitted show union activity by Mace, but not disruptive or intimidating conduct. Even were I to conclude that the Respondent believed that Mace's activities on behalf of the union during worktime were interfering with coworkers, or the completion of Mace's own work, I would find that it was the Respondent's animosity towards the union subject matter of those activities, rather than their severity, which led it to terminate Mace without giving him an opportunity to adjust his conduct. See *Spurlino Materials, LLC*, supra (fact that severity of discipline is out-of-proportion to offense supports finding of discrimination).

For the reasons discussed above, I conclude that the Respondent discriminated in violation of Section 8(a)(3) and (1) on July 24, 2008, when it suspended Mace, and on August 4, 2008, when it converted that suspension into a termination, because of Mace's union and concerted activities and in order to discourage such activities

B. Crane's Written Warnings

The complaint alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) on about September 4 and 9, 2008, by issuing warnings to Crane because he and other employees formed, joined, or assisted the Union and engaged in concerted activities and in order to discourage such activities. The Respondent contends that it properly issued the discipline to Crane based on a good-faith belief that he engaged in misconduct.

The General Counsel has made the required initial showing of discriminatory motive under *Wright Line.* There is no dispute that Crane engaged in protected activity. During the antiunion meeting that the Respondent held with drivers on July 11, Crane was one of the few employees to speak. He objected that the drivers were being required to attend this meeting without getting paid for their time. Then, when Donahue asked why employees would want union representation, Crane spoke out—discussing the Respondent's inattention to a safety issue. In addition, Crane supported the union campaign by signing a union authorization card, distributing union cards and literature, talking to people about the Union, and attending a union meeting. Crane was a visible enough supporter of the Union that one antiunion employee, Belanger, repeatedly confronted him on the subject. Immediately after Crane attempted to explain his prounion stance to Belanger, Belanger went to talk with Driscoll. It is clear that the Respondent was aware, at a minimum, of Crane's protected activity at the Respondent's antiunion meeting on July 11. Moreover, I think it is fair to infer that the Respondent knew of at least some of Crane's other protected activities in support of the Union given that the warehouse was a relatively small shop of about 50 employees, and that Driscoll was actively seeking intelligence about the union campaign. "The courts and the Board have long held that an employer's knowledge of union activities by its employees is inferable where these activities are conducted in a small plant, particularly where as here there is evidence of probing by supervisors to obtain information concerning the union activities of employees." *Wells Dairies Cooperative*, 110 NLRB 875, 891 (1954). A union drive concentrated among a group of 50 employees in a larger work force has been viewed as a "small shop" for purposes of this analysis. Id., see also *ADB Utility Contractors*, supra, slip op. at 16 ("small plant" theory "permits the inference of knowledge of union activity from the fact that there are 59 employees in the unit"). That the Respondent bore animus towards the union effort is demonstrated by, inter alia, its discriminatory termination of Mace, unlawful interrogations, acts creating an impression of surveillance, and Donahue's statement to employees that engaging in union activity at the facility was a "terminatable" offense.

Since the General Counsel has established discriminatory motive, the burden shifts to the Respondent to demonstrate that it would have taken the same action absent Crane's protected conduct. *Intermet Stevensville*, supra; *Senior Citizens*, supra. The Respondent fails to meet this burden because, as discussed fully in the findings of fact above, the record shows that the company rarely if ever disciplined other employees based on conduct comparable to that which it attributes to Crane. See *ADB Utility Contractors*, 353 NLRB No. 21, slip op. at 17 (fact that employer had not disciplined other similarly situated employees for same offense is evidence of pretext) and *Monroe Manufacturing*, 323 NLRB 24, 26–27 (1997) (employer violated Sec. 8(a)(1) when it disciplined an employee who engaged in protected activity based on a rule that was not strictly enforced against other employees). Indeed, Driscoll himself admitted that drivers were rarely disciplined based on store complaints of any kind, and the Respondent offers no lawful explanation for treating Crane differently.

I note, moreover, that the timing of the first warning casts additional doubt on the legitimacy of the Respondent's claim that it would have taken the same action in the absence of union activity. That warning was based on a store complaint received by the Respondent on July 30 about a breach of security policy. However, the warning was not presented to Crane until 6 weeks *after* the Respondent received that complaint. The Respondent provides no explanation for the time lag, or for its decision to revive the complaint, and punish Crane, so long after the alleged misconduct. The absence of such an explanation, along with the evidence of antiunion motivation, suggests that the Respondent's reliance on the stale store complaint was pretextual.

For the reasons discussed above, I conclude that the Respondent has failed to meet its burden of showing that it would have issued any of the warnings to Crane absent the antiunion motivation. Indeed, I believe that examination of the Respondent's treatment of Crane—i.e., issuing three warnings to him in a few days time based on conduct for which other drivers were rarely if ever disciplined—is further evidence of unlawful motive. See *ADB Utility Contractors*, supra.

I conclude that the Respondent discriminated in violation of Section 8(a)(3) and (1) in September 2008 by issuing warnings to Crane because of his union and concerted protected activities, and in order to discourage such activities.

C. Discharge of Adorno, Beattie, and Glover

The complaint alleges that the Respondent discriminated on the basis of union activity when it implemented the requirement that each of its drivers have a Class A CDL and thereby caused the terminations of drivers Adorno, Beattie, and Glover.[33] In its brief, the General Counsel argues that the Class A CDL requirement was imposed to eliminate Beattie, and that Adorno and Glover were "swept up in [the] negative employment action as cover for the discriminatorily motivated act."

The General Counsel has met its initial burden under *Wright Line*. The evidence establishes that the Respondent had knowledge of Beattie's union activism. In July, during the Respondent's antiunion meeting for drivers, Beattie openly acknowledged that he was engaged in union activities and expressed the view that those activities had led the Respondent to retaliate against him by increasing his workload. Moreover, given that there were only approximately 50 to 55 drivers and that Beattie had distributed union cards to between 40 and 45 of them, it is appropriate under the "small facility" theory to infer that the Respondent had knowledge of Beattie's role in the union campaign. See *ADB Utility Contractors*, 353 NLRB No. 21, slip op at 16; *Wells Dairies Cooperative*, 110 NLRB 875, 891 (1954). This inference is especially apt given that Driscoll not only actively probed employees about the union campaign, but had specifically interrogated an employee about Beattie's conversations with other drivers. *Wells Dairies Cooperative*, supra.

[33] The General Counsel argues in the alternative that these individuals were constructively discharged and that they were discharged. In its brief, the Respondent admits that it terminated the employment of Adorno, Beattie, and Glover on September 15, 2008. R. Br. at p. 6, Par. 24. That admission moots the question of whether the standards for constructive discharge were met.

The Respondent's antiunion animus is demonstrated by, inter alia, its: discriminatory discharge of Mace (the other leading union advocate among its employees); discriminatory discipline of Crane; unlawful interrogation of employees; acts creating the impression of surveillance; and Donahue's statement to employees that union activity at the facility was a "terminatable" offense.

The evidence shows that Adorno and Glover were discharged based on the same new licensing requirement with respect to which I find that the General Counsel has met its initial burden. The Board has held that the layoff of an employee who is not the target of an employer's antiunion motivation is still unlawful where that employee was laid off to mask the antiunion motivation of actions against the employer's real target. *Pillsbury Chemical Co.*, 317 NLRB 261 (1995). Antiunion motivation may be found even when some, or even most, of the affected employees were not known union supporters. See, e.g., *McGaw of Puerto Rico, Inc.*, 322 NLRB 438, 451 (1996), enfd. 135 F.3d 1 (1st Cir. 1997). The requisite antiunion animus exists where the evidence shows that the aim of the action was "to discourage union activity or to retaliate against employees because of the union activities of some," despite evidence that "employees who might have been neutral or even opposed to the Union are laid off with their counterparts," Id. See also *Weldun International*, 321 NLRB 733, 734 and 748 (1996) (violation where the employer did not select employees for layoff based on their support for the Union, but the layoff was part of an effort to discourage employees from supporting the Union), enfd. in part 165 F.3d 28 (6th Cir. 1998) (table); *Davis Supermarkets*, 306 NLRB 426 (1992) (same), affd. and remanded 2 F.3d 1162, 1168–1169 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994); *Mini-Togs, Inc.*, 304 NLRB 644, 648 (1991) (same), enfd. in part 980 F.2d 1027 (5th Cir. 1993); *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987) (same); *ACTIV Industries*, 277 NLRB 356, 356 fn. 3 (1985) (same). On this basis, I find that the General Counsel has met its initial burden with respect to the discharges of Adorno and Glover pursuant to the newly adopted licensing requirement.

The burden now falls to the Respondent to show that it would have enacted the new licensing requirement and terminated the three drivers as it did even absent the union activity. Although the question is a close one, I find that the Respondent has failed to meet that burden. The Respondent did present convincing evidence that it had good reason for wanting to phase out the use of the smaller straight trucks in favor of the larger tractor trailer trucks—a change that meant that most or all of its drivers would need Class A licenses. However, the Respondent has failed to demonstrate by a preponderance of the evidence that it would have implemented the new requirement *when* it did and *how* it did if not for its antiunion animus. As the Board has held, in order to meet its responsive burden under *Wright Line* an employer must demonstrate by a preponderance of the evidence "that it would have done *what* it did, *when* it did, in the absence of the drivers' union activities." *We Can, Inc.,* 315 NLRB 170, 172 (1994) (emphasis added); cf. *Lear-Siegler, Inc.*, 295 NLRB 857, 859 (1989) (economic reasons cannot justify relocation where such economic reasons existed months before employees sought union representation, and relocation followed immediately thereafter). It is not enough to show that it could have taken the action it did for the reasons given, rather must show that it would have taken the action for the reasons given. *Structural Composites Industries*, 304 NLRB 729, 729–730 (1991); see also; *Weldun International*, 321 NLRB at 747 ("The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence") (internal quotation omitted).

Regarding *when* the Respondent implemented the new requirement, the evidence showed that the Respondent issued the memorandum setting forth the new requirement *on the same day as* the Respondent held the July 11 antiunion meeting during which Donahue warned drivers that union activity at the facility was a "terminatable" offense. Driscoll posted the memorandum the next day. At the July 11 meeting, Beattie openly acknowledged his union activity and, as that meeting was ending, Driscoll pulled Beattie aside and orally notified him about the new requirement and the September 15 deadline. This timing is extremely suspicious, see supra footnote 32, and leaves the Respondent with a great deal of explaining to do regarding the precise timing of its action. Its witnesses did not rise to the challenge. Donahue, the official who testified about the process by which the new requirement was adopted offered no explanation for the precise timing of the rule's promulgation. Asked when the Respondent made the decision to impose the new licensing requirement, Donahue's answer was decidedly vague—"back in May–April, May, June in that area." He did not explain why, if the decision was made as early as April, it was not announced to affected employees until July 11—the same day that the Respondent inaugurated its antiunion campaign among the drivers. Furthermore, the Respondent produced no written record of meetings or proposals, or other documentation, showing how the decision was made or demonstrating that the decisional process naturally culminated on July 11 for reasons unrelated to the union campaign or Beattie's public acknowledgment of his involvement in that campaign. Cf. *Weldun International*, 321 NLRB at 734 (layoff found unlawful where employer failed to produce "any documentation or credited testimony" indicating that a layoff was planned prior to the filing of the representation petition). I note, moreover, that the major changes in delivery responsibilities (the addition of coffee and high volume items) that the Respondent relies on to explain the timing of its decision had largely been implemented several months earlier in March and April. Those changes do not explain the timing of the new requirement since they were made months before the employees began their union campaign while the issuance of the new rule followed shortly after that campaign was initiated. See *Lear-Siegler, Inc.,* supra.

Not only has the Respondent failed to show by a preponderance of the evidence that it would have implemented the requirement *when* it did absent the union activity, it has failed to show that it would have implemented the requirement *how* it did absent that activity. The "how" to which I am referring is under an extremely short deadline that was almost certain to result in the elimination of Beattie from his position as a driver. The July 11 announcement of the September 15 deadline left

the three alleged discriminatees with just a little over 2 months to pass the written test and background check needed for a training permit, complete driver training that typically took 120 to 160 hours, and then schedule and pass the test—all while continuing to work full time. The Respondent attempted to show that this deadline was workable by presenting the testimony of Marques, a driver who upgraded from a Class B to a Class A license while working for the Respondent full time. However, even Marques did not succeed in upgrading within 2 months. The evidence showed that Marques already had his Class A permit in April and began training, but did not obtain his Class A license until July—over 2 months later. The task for Beattie, Adorno, and Glover was even more daunting than for Marques, since they did not have Class A permits on July 11 when the Respondent initiated the countdown to the September 15 deadline. The Respondent has not explained how the September 15 deadline was arrived at, or why it did not choose to allow Beattie, Adorno, and Glover more time, or an extension of time, in which to meet the new requirement. The Respondent has not tied the specific September 15 date to any occurrence unrelated to the union campaign. This gap in the Respondent's nondiscriminatory explanation for its decision is widened by Donahue's testimony that the decision was made as early as April, meaning that the Respondent might have been able to give the drivers as much as 5 months to meet to the September 15 deadline, rather than springing that deadline under circumstances that meant the drivers would almost certainly fail to meet it.

For the reasons discussed above, I conclude that the Respondent has failed to meet its burden of showing that it would have taken the same action it did, when it did, in the absence of antiunion motivation.

I conclude that the Respondent discriminated in violation of Section 8(a)(3) and (1) by imposing the new licensing requirement and discharging Adorno, Beattie, and Glover.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent interfered with employees' exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act: in July 2008, when Driscoll coercively interrogated Glover about Beattie's conversations with other drivers; on July 24, 2008, and again approximately one week later, when Driscoll coercively interrogated Mace; in July 2008 by creating the impression that it had placed the employees' union activities under surveillance.

4. The Respondent violated Section 8(a)(3) and (1) of the Act: on July 24, 2008, when it suspended Mace, and on August 4, 2008, when it converted that suspension into a termination, because of Mace's union and concerted activities and in order to discourage such activities; in September 2008, by issuing warnings to Crane because of his union and concerted protected activities, and in order to discourage such activities; when it imposed the new licensing requirement and discharged Adorno, Beattie, and Glover on September 15, 2008, because of employees' union and concerted activities and in order to discourage such activities.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be required to offer Adorno, Beattie, Glover, and Mace reinstatement and make them whole for any loss of earnings and other benefits they suffered as a result of the discrimination against them, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel urges that the Board's "current practice of awarding only simple interest on backpay and other monetary awards be replaced with the practice of compounding interest." Brief of General Counsel at 64. The Board has considered, and rejected, this argument for a change in its practice. *Cadence Innovation, LLC*, 353 NLRB No. 77, slip op. at 1 fn. 1 (2009); *Rogers Corp.*, 344 NLRB 504 (2005). If the General Counsel's argument in favor of compounding interest has merits, those merits are for the Board to consider, not me. I am bound to follow Board precedent on the subject. See *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order[34]

ORDER

The Respondent, DPI New England, Canton, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about activities protected by Section 7 of the Act.

(b) Creating the impression that it has placed employees' union activities under surveillance.

(c) Discharging or suspending any employee for supporting the International Brotherhood of Teamsters, Local 25 or any other union.

(d) Issuing a written warning to, or otherwise disciplining, any employee for supporting the International Brotherhood of Teamsters, Local 25 or any other union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace, and within 3 days thereafter notify them in writing that this has been done and that the discipline would not be used against them in any way.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension or Derek Mace, and within 3 days thereafter notify him in writing that this has been done and that the discipline would not be used against him in any way.

(e) Rescind and revoke the written warnings issued to Frederick "Rick" Crane in September 2008.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful written warnings issued to Frederick "Rick" Crane, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Canton, Massachusetts, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2008.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 29, 2009

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT create the impression that we have placed your union activities under surveillance.

WE WILL NOT discharge, suspend, or otherwise discipline against any of you for supporting International Brotherhood of Teamsters, Local 25, or any other union.

WE WILL NOT issue warnings or other discipline to you for supporting International Brotherhood of Teamsters, Local 25, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Alexander Adorno, Roger Beattie, Anthony Glover, and Derek Mace, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension of Derek Mace, and WE WILL, within 3 days thereafter, notify him

[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL, within 14 days from the date of this Order, rescind and revoke the unlawful written warnings issued to Frederick "Rick" Crane.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful written warnings issued to Frederick "Rick" Crane, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warnings will not be used against him in any way

DPI NEW ENGLAND